TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 214 58.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

BERTHA ZERNECKE, ADMINISTRATRIX OF THE ESTATE OF ERNEST H. ZERNECKE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MAY 10, 1900.

(17,749.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 19, 1900.

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1 THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY Company
vs.
BERTHA ZERNECKE, Administratix of the Estate of Ernest H. Zernecke, Deceased.

Pleas before the supreme court of the State of Nebraska, at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 2nd day of January, 1900.

Present: Hon. T. L. Norval, chief justice; Hon. J. J. Sullivan, Hon. Silas A. Holcomb, judges.
Attest: D. A. CAMPBELL, *Clerk*.

Be it remembered that on the 16th day of April, 1897, there was filed in the office of the clerk of said court a certain petition in words and figures following, to wit:

THE CHICAGO, ROCK ISLAND & PACIFIC RAILway Company, Plaintiff in Error,
vs.
BERTHA ZERNECKE, Administratrix of the Estate of Ernest H. Zernecke, Deceased, Defendant in Error.
} Petition in Error.

The plaintiff in error, The Chicago, Rock Island & Pacific Railway Company, complains of the defendant in error, Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased, for that on the 18th day of November, 1896, the defendant in error recovered a judgment against the plaintiff in error in the district court of Thayer county, Nebraska, for the sum of forty-five hundred dollars and costs of suit, taxed at $—, in an action pending in said
2 court wherein the defendant in error herein was plaintiff and the plaintiff in error herein was defendant. A transcript of the proceedings containing said final judgment is filed herewith.

The plaintiff in error alleges that there is error in said proceedings and judgment in this, to wit:

1. The court erred in overruling the motion of plaintiff in error for a new trial; to which ruling of the court plaintiff in error duly excepted. See Transcript, page 27.

2. The court erred in refusing a new trial herein; to which ruling of the court plaintiff in error duly excepted. Transcript, page 27.

3. The damages are excessive, appearing to have been given under the influence of passion and prejudice.

4. The verdict of the jury is not sustained by sufficient evidence.

5. The verdict of the jury is contrary to law.

6. Errors of law occurring at the trial; to which plaintiff in error duly excepted.

7. The court erred in allowing defendant in error to introduce testimony, over objection of plaintiff in error, that the petition did not state facts sufficient to constitute a cause of action in favor of de-

fendant in error and against plaintiff in error. Bill of exceptions, page 2.

8. The court erred in giving to the jury instruction numbered three of the instructions given by the jury on the court's own motion; to which the plaintiff in error duly excepted at the time. Transcript, page —.

9. The court erred in giving to the jury instruction numbered four of the instructions given the jury on the court's own motion; to which plaintiff in error duly excepted at the time. Transcript, page —.

10. The court erred in giving to the jury instruction numbered five of the instructions given to the jury on the court's own motion; to which plaintiff in error duly excepted at the time. Transcript, page —.

11. The court erred in giving to the jury instruction num-
3 bered six of the instructions given to the jury on the court's own motion; to which plaintiff in error duly excepted at the time. Transcript, page —.

12. The court erred in giving to the jury instruction numbered seven of the instructions given to the jury on the court's own motion; to which plaintiff in error duly excepted at the time. Transcript, page —.

13. The court erred in giving to the jury instruction numbered one of the instructions given on request of the defendant in error; to which plaintiff in error duly excepted at the time. Transcript, page —.

14. The court erred in giving to the jury instruction numbered two of the instructions given on request of the defendant in error; to which plaintiff in error duly excepted at the time. Transcript, page —.

15. The court erred in giving to the jury instructions numbered three of the instructions given on request of the defendant in error; to which plaintiff in error duly excepted at the time. Transcript, page —.

16. The court erred in refusing to give to the jury instruction numbered one of the instructions requested by the plaintiff in error; to which ruling of the court plaintiff in error duly excepted at the time. Transcript, page —.

17. The court erred in refusing to give to the jury instruction numbered three of the instructions requested by plaintiff in error; to which ruling of the court plaintiff in error duly excepted at the time. Transcript, page —.

18. The court erred in refusing to give to the jury instruction numbered two of the instructions requested by plaintiff in error; to which ruling of the court plaintiff in error duly excepted at the time. Transcript, page —.

19. The court erred in modifying instruction numbered three of the instructions requested by plaintiff in error, and erred in
4 giving said instruction as modified; to which plaintiff in error duly excepted at the time. Transcript, page —.

20. The court erred in excluding competent and proper evidence

offered by the plaintiff in error; to which ruling of the court the plaintiff in error duly excepted. Transcript, page —.

21. The court erred in excluding and refusing to admit the testimony of the witness Harry Foote, showing the condition of the railroad track, bridge, and trestle-work at the place of the wreck shortly after the wreck occurred; to which plaintiff in error duly excepted. Bill of exceptions, page —.

22. The court erred in excluding and refusing to admit the testimony of the witness Harry Foote as to the speed at which the train in question had been run and operated for several months immediately prior to the time of the wreck in question; to which plaintiff in error duly excepted. Bill of exceptions, page —.

23. The court erred in refusing to admit the answer of the witness Harry Foote to questions numbered 19 to 37, inclusive, and erred in refusing to admit each of them; to each of which rulings plaintiff in error duly excepted. Bill of exceptions, page —.

24. The court erred in sustaining the objections of the defendant in error to the question numbered 19 to 37, inclusive, in the deposition of the witness Harry Foote, and erred in sustaining defendant in error's objection to each of said questions; to each of which rulings of the court plaintiff in error duly excepted. Bill — exceptions, page —.

25. The court erred in excluding, on objection of defendant in error, the answers of the witness Harry Foote to questions numbered 19 to 37, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding each of the answers to each of the said questions; to each of which rulings of the court plaintiff in error duly excepted. Bill — exceptions, page —.

26. The court erred in excluding, on objection of defendant in error, the answer of the witness Lewis Ryan to question numbered one to thirty-three, inclusive, and fifty-two, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which rulings plaintiff in error duly excepted. Bill — exceptions, page —.

27. The court erred in excluding, on objection of defendant in error, the answers of the witness Ernest Shellabarger to questions numbered 53 to 67, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which rulings of the court plaintiff in error duly excepted. Bill — exceptions, page —.

28. The court erred in excluding, on objection of defendant in error, the answers of the witness Fred Foster to questions numbered 87 to 103, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to which rulings of the court plaintiff in error duly excepted. Bill — exceptions, page —.

29. The court erred in excluding, on objection of defendant in error, the answers of the witness Bert Foster to questions numbered

105 to 136, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which rulings of the court plaintiff in error duly excepted. Bill — exceptions, page —.

30. The court erred in excluding, on objection of defendant in error, the answers of the witness W. E. Painter to questions numbered 167 to 192, inclusive, and 208 to 211, inclusive, and erred in sustaining the defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which rulings of the court plaintiff in error duly excepted. Bill — exceptions, page —.

31. The court erred in excluding, on objection of defendant in error, the answers of the witness Bert Cambridge to questions numbered 212 to 232, inclusive, and erred in sustaining defend-
6 ant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which rulings of the court the plaintiff in error duly excepted. Bill — exceptions, page —.

32. The court erred in excluding, on objection of defendant in error, the answers of the witness Miss Lettie Seidell to questions numbered 237 to 267, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which rulings of the court plaintiff in error duly excepted. Bill — exceptions, page —.

33. The court erred in excluding, on objection of defendant in error, the answers of the witness Alonzo Cambridge to questions numbered 271 to 286, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which rulings of the court the plaintiff in error duly excepted. Bill — exceptions, page —.

34. The court erred in excluding, on objection of defendant in error, the answers of the witness Ernest Tyrer to questions numbered 287 to 310, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which rulings of the court plaintiff in error duly excepted. Bill — exceptions, page —.

35. The court erred in excluding, on objection of defendant in error, the answers of the witness Walter Seidell to questions numbered 311 to 373, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which rulings of the court the plaintiff in error duly excepted. Bill — exceptions, page —.

36. The court erred in excluding, on objection of defendant in error, the answers of the witness William Weems to questions numbered 404 to 434, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which rulings of the court plaintiff in error duly excepted. Bill — exceptions, page —.

7 37. The court erred in excluding, on objection of defendant in error, the answers of the witness William Lonsdale to questions numbered 435 to 457, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which rulings of the court the plaintiff in error duly excepted. Bill — exceptions, page —.

38. The court erred in excluding, on objection of defendant in error, the answers of the witness Fred Lonsdale to questions numbered 458 to 486, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to which plaintiff in error duly excepted. Bill — exceptions, page —.

39. The court erred in excluding, on objection of defendant in error, the answers of the witness O. B. Ramey to questions numbered 487 to 516, inclusive; 577 to 581, inclusive; 600 to 604, inclusive, and 606 to 607, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which rulings of the court plaintiff in error duly excepted. Bill — exceptions, page —.

40. The court erred in excluding, on objection of defendant in error, the answers of the witness Mrs. Nettie Collier to questions numbered 613 to 632, inclusive, and erred in sustaining defendant in error's objections to the said questions, and erred in excluding the answers to each of said questions; to each of which rulings of the court the plaintiff in error duly excepted. Bill — exceptions, page —.

41. The court erred in excluding the evidence of the witness J. H. McKinstry, offered by the plaintiff in error, showing the condition and character of the plaintiff in error's railroad track, trestle-work, and bridge, and the appliances thereof, at the place where it is claimed the deceased was killed and on the evening of August 9, 1894, before the wreck in question occurred and before the train referred to in defendant in error's petition was derailed.

8 42. The court erred in excluding the evidence of the witness J. H. McKinstry, offered by the plaintiff in error, showing the condition and character of the plaintiff in error's railroad track, bridge, and trestle-work, and the appl*i*ances thereof, on the night of the wreck in question and after the train referred to in defendant in error's petition was derailed. .

43. The court erred in excluding the evidence of the witness G. J. Bishop, offered by plaintiff in error, showing the condition and character of the plaintiff in error's railroad and track and bridge at the place where it is claimed the deceased was killed and on either side thereof before and after the derailment of the train referred to in defendant in error's petition and at all times in question.

44. The court erred in excluding the evidence of the witness C. H. Cherry, offered by the plaintiff in error, showing the manner and the speed at which the train in question was being run and operated at the time it is claimed the deceased was killed, and the manner and speed at which it was customary to operate and run said train

over the track at the place in question and in other places, and that he had in his possession at the time of said derailment the passes and money referred to in said offer of his testimony.

45. The court erred in excluding the evidence of the witness R. W. Day, offered by plaintiff in error, showing the condition and character of plaintiff in error's railroad at the place where it is claimed the deceased was killed and on either side thereof before and after the death of the deceased, and showing that said railroad extended in a straight line and on a tangent in either direction from the place where the train in question was derailed, and that the derailment occurred at a place on said track where there was no curve, and also showing the kind and character of the most skilfully and prudently conducted railroads in the United States, and the kind and character of material used in the construction and maintenance of the plaintiff in error's railroad at all points
9 in question, and showing the manner in which and speed at which trains on the plaintiff in error's railroad and on other railroads were, at all times in question, run and operated.

46. The court erred in excluding the evidence of the witness Miss Lettie Siedell, offered by the plaintiff in error, showing the condition of the plaintiff in error's railroad, at all places in question, within a few minutes after the derailment of the train in question, and showing that witness found the passes and money referred to in the offer of her testimony and at the time and place stated in said offer.

47. The court erred in sustaining the exceptions of defendant in error, filed November 17, 1896, to the depositions of the witnesses Lewis Ryan, Ernest Shellabarger, Fred Foster, O. B. Ramey, Nettie Collier, Bert Cambridge, Lettie Seidell, Alonzo Cambridge, Ernest Tyrer, Walter Seidell, William Weems, Harry Foote, and William Lonsdale, Bert Foster, William E. Painter, and Fred Lonsdale, and erred in sustaining the exceptions to each of said depositions, and erred in sustaining defendant in error's said exceptions to each question contained in each of said depositions.

48. The court erred in admitting in evidence the certified copy of the letters of administration of defendant in error offered by defendant in error.

49. The verdict should have been for the plaintiff in error.

50. The court should have instructed the jury to find for the plaintiff in error.

51. The court failed to properly instruct the jury with reference to the law of the case.

52. The petition did not state facts sufficient to constitute a cause of action against the plaintiff in error and in favor of the defendant in error.

53. The court erred in instructing the jury as follows:

"The statutes of this State provide that railroad companies
10 shall be liable for all damages inflicted upon the person of passengers while being transported over their roads, except in certain cases, which are not important in this case, as neither of them are alleged to have occurred here, and consequently, in my opinion, it is not necessary that you consider whether or not defend-

ant was guilty of any neglect in managing its train and road, and the evidence relating to that question which has been tendered by defendant has been excluded, and you will not allow it in any manner to influence your verdict in this case." The statute referred to in said instruction is contrary to and inconsistent with the fourteenth amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws; and with sections three and twenty-one of article 1 of the constitution of Nebraska.

Wherefore plaintiff in error prays that said judgment may be reversed and a new trial granted in this cause, and for such other relief as justice may require.

W. F. EVANS,
L. W. BILLINGSLEY,
R. J. GREENE,
Attorneys for Plaintiff in Error.

(*Waiver of Summons. Filed April 16th*, 1897.)

I hereby waive the issuing and service of summons in error in this case and enter an appearance herein.

STEWART & MUNGER,
Attorneys for Plaintiff.

Endorsed: 9149. Chicago, R. I. & P. R'y *vs.* Zernecke. Petition in error and waiver. Supreme court of Nebraska. Filed Apr. 16, 1897. D. A. Campbell, clerk.

And on the same day, to wit, the 16th day of April, 1897,
11 there was filed in the office of the clerk of said court a certain transcript in words and figures following, to wit:

Pleas before the district court of the seventh judicial district of Nebraska in and for the county of Thayer, at a term thereof begun and holden in the city of Hebron, in said county and State, on the 9 day of November, one thousand eight hundred and ninety-six.

Present: Honorable W. G. Hastings, judge; A. Lindsey, sheriff; Geo. W. Wasson, clerk.

The following proceedings were had and done, to wit:

Be it remembered that at the several times hereinafter set forth were filed in the office of the clerk of said court papers and pleadings, of which the following are full, true, and correct copies, and proceedings were had and done in the cause below named as follows, to wit:

January 27th, 1896, a petition was filed *was filed* in the office of the clerk of said court in words and figures following, to wit:

In the District Court of Thayer County, Nebraska.

BERTHA ZERNECKE, as Administratrix of the Estate of Ernest H. Zernecke, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY Company, Defendant. } Petition.

12 1st. The plaintiff complains of the defendant and alleges that on the 10 day of November, 1894, this plaintiff was duly appointed and qualified as administratrix, and letters of administration were duly issued and granted to her, of the estate of Ernest Zernecke, deceased, by the probate court of Lancaster county, Nebraska, and the plaintiff sues as such administratrix.

2nd. That the defendant is and at the times hereinafter mentioned was a corporation duly incorporation under the laws of the State of Nebraska, and owned and operated a railroad therein known as the Chicago, Rock Island and Pacific railway, and was and is a common carrier of passengers for hire between the places hereinafter mentioned and between the stations of Martel, Nebraska, and Lincoln, Nebraska, all of which railroad between said stations is in the State of Nebraska.

3rd. On or about the 9th day of August, 1894, the said defendant, in consideration of the sum of 41 cents, received the said Ernest H. Zernecke, then living, as a passenger on said railroad from Martel, Nebraska, to said Lincoln, Nebraska, and while said Ernest H. Zernecke was on the cars, on said journey, as a regular passenger, at a distance of about five miles south of Lincoln, Nebraska, and in this State, the car in which said Ernest H. Zernecke was riding was by the negligence of the defendant and its servants derailed, thrown from, and ran off the track, and said Ernest H. Zernecke was, without fault or negligence on his part, thereby killed.

4th. Plaintiff further alleges that said Ernest H. Zernecke left the plaintiff, Bertha Zernecke, his widow, him surviving; Zilda Zernecke, his daughter, aged eight years; Marie Zernecke, his daughter, aged six years, and Carl F. Zernecke, his son, aged one year, his only children and next of kin, who were dependent upon him for support, and said children were dependent upon him for maintenance and education also.

Plaintiff further avers that said Ernest H. Zernecke was at the time of his death about 40 years of age and in good health,
13 able to perform manual labor and to conduct general real estate and abstracting business, in which he was then engaged; that he was able to earn and did earn thereby the sum of $2,000.00 per year, and that the earnings from his said business were applied to the support and maintenance of his said family, the plaintiff and their said minor children, and that his said labor and business were their only means of support, education, and maintenance possessed by said family, and said widow and minor children of said Ernest H. Zernecke have sustained permanent damage by reason of the aforesaid wrongful act, neglect, and default of said defendant in the sum of five thousand dollars.

Wherefore plaintiff prays, as such administratrix, for judgment against the defendant for the amount of five thousand dollars and costs of suit.

C. L. RICHARDS,
STEWART AND MUNGER,
Attorneys for Plaintiff.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

John M. Stewart, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff; that she is absent from the State, and he believes the above allegations are true.

JOHN M. STEWART.

Subscribed and sworn to before me November 16, 1895.

THOMAS C. MUNGER,
[SEAL.] *Notary Public.*

We hereby agree to become security for costs in this case.

JAS. DINSMORE.
C. L. RICHARDS.

Security for costs approved January 27, 1896.

GEO. W. WASSON,
[SEAL.] *Clerk District Court.*

14 And afterwards, on the 19th day of February, 1896, there was filed in the office of said clerk the answer in words and figures following, to wit:

In the District Court of Thayer County, Nebraska.

BERTHA ZERNECKE, as Administratrix of the Estate of Ernest H. Zernecke, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant. } Answer.

1st. Comes now said defendant, and for answer to plaintiff's petition in the above-entitled cause denies all and singular the allegations thereof, except such as are hereinafter expressly admitted.

2nd. Further answering, defendant admits and avers:

1st. That it is and at all times mentioned in said petition was a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa and a domestic corporation of the State of Nebraska.

2nd. That at all times mentioned in said petition it was the owner of and was operating a railroad in the State of Nebraska, and was and is a carrier of passengers for hire between the stations of Martel, Nebraska, and Lincoln, Nebraska, on said railway. But the defendant denies that the said Ernest H. Zernecke, deceased, mentioned in said petition, was injured in any way by reason of the

carelessness or negligence of this defendant or any of its servants, agents, or employés, and denies that the said Ernest H. Zernecke was killed by reason of any carelessness or negligence on the part of the defendany or any of its servants, agents, or employés.

15 3rd. Further answering, the defendant avers that on or about the 9 day of August, 1894, near Lincoln, in the county of Lancaster, State of Nebraska, and at the time in said petition stated, the train and car mentioned in said petition, while being run and operated with all possible care and caution, were by some person or persons not in the employ or under the control of the defendant and without its knowledge wilfully, maliciously, and feloniously derailed and thrown from the track on which they and each of them were at said time being run and operated, resulting in great loss to the defendant, its servants, agents, and employés; that said person or persons who derailed and threw said train and car from the track, as aforesaid, wilfully, maliciously, and feloniously removed and displaced from the track aforesaid at the point of said derailment certain spikes, nuts, angle bars, fish-plates, bolts, and rails and otherwise tore up and destroyed said track of defendant at the point aforesaid, and caused said car and train to be derailed and thrown from the track, as aforesaid, without any carelessness or negligence on the part of the defendant or any of its agents, servants, or employés; that said car and train at the time of being derailed and thrown from the track, as aforesaid, and at all other times *was* operated and run in a skillful and proper manner and with great care and caution; that the said railroad and track at the point aforesaid and at all other points was kept and maint*enance* in good and safe condition and repair, and that the defendant did not know and had no means of knowing at the time of said derailment or prior thereto of the removal or displacement from said track of said nuts, bolts, angle bars, fish-plates, and rails or either of them and did not know and had no means of knowing that said track at said point had been torn up or destroyed, and that the defendant could not by the exercise of the utmost care, caution, prudence, and foresight have prevented said derailment and wrecking of said train and car.

16 The defendant avers that as to whether the said Ernest H. Zernecke, mentioned in said petition, was on said train or car at the time of said derailment it has no knowledge or information thereof sufficient to form a belief, and that as to whether the said plaintiff was on the 10 day of November, 1894, or at any other time duly appointed and qualified as administratrix of the estate of said Ernest H. Zernecke, deceased, the defendant has not knowledge or information thereof sufficient to form a belief.

And, having fully answered, the defendant asks to be discharged hence with its costs in this behalf laid out and expended.

W. F. EVANS &
J. E. DOLMAN,
Attorneys for Defendant.

THE STATE OF NEBRASKA, } ss:
County of Shawnee, }

W. F. Evans, of lawful age, being first duly sworn, deposes and says that he is the agent and attorney of the above-named defendant, having authority to make and as such makes this affidavit; that he has read the above and foregoing answer, and that the facts therein stated are true as he verily believes.

W. F. EVANS.

Subscribed and sworn to before me this 18 day of February, 1896.

A. A. GRAHAM,
Notary Public.

[SEAL.]

And afterwards, on the 17th day of March, 1896, there was filed in the office of said clerk a reply, and afterwards, on the 16 day of November, 1896, there was filed in the office of said court an amended reply by leave of the court in the words and figures following, to wit:

In the District Court of Thayer County, Nebraska.

17 BERTHA ZERNECKE, as Administratrix of the Estate of Ernest Zernecke, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company, Defendant. } Amended Reply.

The plaintiff by way of amended reply to the answer of defendant admits that the defendant is and was at all times mentioned in plaintiff's petition a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and was a domestic corporation of the State of Nebraska; plaintiff also admits that—all times mentioned in plaintiff's petition it was the owner of and was operating a railroad in the State of Nebraska, and was and is a carrier of passengers for hire between the stations of Martel, Nebraska, and Lincoln, Nebraska, on said railroad.

Plaintiff further admits that on or about the 9 day of August, 1894, near Lincoln, in the county of Lancaster, State of Nebraska, and at the time in the petition stated, the train and car mentioned in the petition was derailed and thrown from the track on which they and each of them were at the time being run and operated, and denies each and every other allegation in the answer contained.

STEWART & MUNGER,
Attorneys for Plaintiff.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

John M. Stewart, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff, and that he believes the above allegations are true.

——.

18 Subscribed and sworn to before me this — day of November, 1896.

Verification waived and filing at this date agreed to.
November 16, 1896.

W. F. EVANS &
L. W. BILLINGSLEY,
Attorneys for Defendant.

And afterwards, on the 16 day of November, 1896, there *was* filed in the office of said clerk objections of plaintiff to portions of J. C. Puetz's deposition in words and figures following, to wit:

In the District Court of Thayer County, State of Nebraska.

BERTHA ZERNECKE, Administratrix of the Estate of Ernest H. Zernecke, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

Comes now said defendant and objects to and moves the court to suppress the following part of the deposition of J. C. Puetz taken by the plaintiff herein:

Q. "And at the time the wreck occurred—just before the wreck occurred—about what speed would you say the train was making?"

Defendant objects to this question for the reason it is incompetent; for the further reason that the competency of the witness to answer the question is not shown, nor is it shown that the witness is or was qualified to state the speed of the train at this time referred to by the question. The question calls for a conclusion and no foundation is laid therefor.

Q. "What indications, if any, were there as to the speed of
19 the train, did you notice?"

The question is objected to by the defendant as incompetent, and for the further reason that the competency of the witness to answer the question is not shown; the question calls for the opinion of the witness on a question for the jury to determine, and for the further reason that the question and the evidence called for is immaterial and irrelevant.

To the last question, quoted above, the witness answered as follows:

A. "Why, the train was running very fast; in fact, it was behind time, trying to make up time. It seemed to me they were running about as fast as they could turn the wheels."

To that portion of said answer, to wit, "Why, the train was running very fast," defendant objects because the same is not responsive to the question, and it is not shown that the witness was qualified to testify about the speed of the train, or that he at any time observed or paid any attention to the manner in which the train was running, or the speed thereof.

To that portion of said answer, to wit, "In fact, it was behind time, trying to make up time," the defendant objects because the same is incompetent and immaterial, and the competency of the witness to testify in reference to the matter referred to in that portion of said answer is not shown, and because it is not responsive to said question.

To that portion of said answer, to wit, "It seemed to me they were running about as fast as they could turn the wheels," the defendant objects because it is incompetent, and for the reason that the competency of the witness to testify or to give an opinion in reference to the matter referred to by that portion of said answer is not shown. It is not shown that the witness knows anything about the running of trains or as to how fast the wheels could turn, nor is it shown that the witness is qualified to testify in reference to the running of said train.

W. F. EVANS AND
L. W. BILLINGSLEY,
Attorneys for Defendant.

And afterwards, on the 16 day of November, 1896, there *was* filed in the office of said clerk exceptions to depositions in words and figures following, to wit:

In the District Court of Thayer County, Nebraska.

BERTHA ZERNECKE, Administratrix of the Estate of Ernest H. Zernecke, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

The plaintiff objects and excepts to the questions propounded in the deposition of Harry Foote, as shown by the deposition of said Foote in this case, as follows:

Plaintiff objects to question 19 as immaterial, incompetent, and irrelevant.

" " " 20 " "
" " " 24 " "
21 " " " 25 " "
" " " 27 " "
" " " 29 " "

and no foundation laid.

To question thirty as immaterial, incompetent, and irrelevant, not within the issues of the case.

Plaintiff moves to strike out *of* the answer to question thirty as incompetent, irrelevant, and immaterial, and because it is not pertinent to the issues of this case.

To question 31 plaintiff objects as incompetent, irrelevant, and immaterial and not within the issues of the case.

To question 32 as immaterial and irrelevant.

Plaintiff objects to question 33 as irrelevant, incompetent, and immaterial.

Plaintiff objects to question 34 as immaterial, irrelevant, and incompetent.

Plaintiff objects to question 35 as incompetent, irrelevant, and immaterial.

Plaintiff objects to question 36 as immaterial and irrelevant.

Plaintiff objects to question 37 as immaterial and irrelevant.

STEWART & MUNGER,
C. L. RICHARDS,
Attorneys for Plaintiff.

Journal Entry.

BERTHA ZERNECKE, Administratrix of the Estate of Ernest H. Zernecke, Deceased, Plaintiff,
22
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

Now, on this 17 day of November, 1896, the same being the eight day of the November, 1896, term of said court—

This cause came on to be heard upon the exceptions of the plaintiff, filed November 16, 1896, to the depositions of the defendant, and the court, being duly advised in the premises, sustains said exceptions and each of them; to which ruling of the court in sustaining said exceptions and sustaining each of them the defendant duly excepts at this time.

And on the day last aforesaid this cause came on to be heard upon the exceptions of the defendant, and filed November 16, 1896, to the depositions of the plaintiff, and the court, being duly advised in the premises, sustained said exceptions and each of them; to which ruling of the court in sustaining said exceptions and each of them the plaintiff duly excepts at the time.

And now, on the day last aforesaid, said cause comes on for trial. A jury consisting of B. L. Tripp, S. L. Hole, Silas Garrison, Chas. Waltemath, Geo. Wegener, H. C. Sappenfield, James McBeth, Warren Duffer, A. C. Ring, Albert Hall, Bert Cropsey, James Train is duly impanelled and sworn to try this cause and a true verdict render according to the evidence adduced and under the instructions of the court. After statements of counsel to the jury plaintiff proceeds with the introduction of testimony, and the hour of adjournment having arrived, it is ordered by the court that court adjourn until tomorrow morning at 9 o'clock.

And afterwards, on the 18 day of November, 1896, there *was* filed in the office of said clerk instructions requested by defendant in words and figures following:

23 In the District Court of Thayer County, Nebraska.

BERTHA ZERNECKE, Administratrix of the Estate of E. H. Zernecke, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company, Defendant.
} Instructions Requested by Defendant.

1st. The court instructs the jury that under the law and evidence in this case your verdict must be for the defendant.

Refused. W. G. H.

Defendant excepts.

The court instructs the jury that if the defendant, in the operation and maintenance of its railroad and trains, used and observed all possible care, caution, and foresight to prevent accident and to care for its passengers that was practicable in its operation of said road and trains, then the defendant would not be liable in this case, and your verdict should be for the defendant.

Refused. W. G. H.

Defendant excepts.

3.

The court instructs the jury that in estimating the amount of damages in this case you are not authorized to allow the amount that the deceased would have earned had he lived, except so far as you find that such earnings would have been applied to the use of plaintiff and her children, and have been lost to them by his death, as alleged.

Given as changed by adding all after "except." W. G. H.

Defendant excepts.

24 And afterwards, on the 18 day of November, 1896, there *was* filed in the office of said clerk instructions in the words and figures following, to wit:

BERTHA ZERNECKE, Administratrix,
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY Company.
} Instructions.

1.

Gentlemen, plaintiff in this case says that she is administratrix of Ernest H. Zernecke; that defendant is a railway company incorporated and operating a railway in this State between Martel and Lincoln; that in August, 1894, Ernest Zernecke was a passenger on a train of said railway company, and near Lincoln the car was thrown from the track and Ernest H. Zernecke killed without fault or negligence on his part by said derailment of the train.

Given. W. G. H.

Defendant excepts.

2.

Plaintiff says that Ernest H. Zernecke left surviving him plaintiff, as widow, and Zilda, his daughter, aged eight years, and Marie, his daughter, aged six years, and Carl, his son, aged one year, and that they were dependent upon him for support; that he was about forty years of age, in good health, and able to earn $2,000.00 a year, and applied his earnings to the support of his family, and by his death they have suffered damage in the sum of $5,000, for which plaintiff asks judgment.

Given.

W. G. H.

Defendant excepts.

25

3.

Defendant admits its incorporation and operating the railroad in question, but denies the killing of Ernest H. Zernecke, and denies the authority of plaintiff, as administratrix, and the other allegations of plaintiff except as admitted.

Give-.

W. G. H.

Defendant excepts.

4.

Defendant also says that a wreck occurred on the railway in question and a train was derailed on August 9, 1894, but says that it was done by the action of a third party interfering with defendant's track, and denies that the defendant's negligence in any manner caused or contributed to the death of Ernest H. Zernecke.

Given.

W. G. H.

Defendant excepts.

5.

The statutes of this State provide that railroad companies shall be liable for all damages inflicted upon the person of passengers while being transported over their roads except in certain cases, which are not important in this case, as neither of them are alleged to have occurred here, and consequently, in my opinion, it is not necessary that you consider whether or not defendant was guilty of any neglect in managing its trains and road, and the evidence relating to that question, which has been tendered by defendant, has been excluded, and you will not allow it in any manner to influence your verdict in this case.

Given.

W. G. H.

Defendant excepts.

6.

The laws of this State provide that in case death results from any wrong, neglect, or default for which the party dying could
26 have brought an action, his administrator can bring one for the benefit of the widow and next of kin of the deceased,

and in every such action the jury shall give such damages as they deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of the deceased not exceeding five thousand dollars.

Given. W. G. H.

Defendant excepts.

7.

If you find for plaintiff in this case your assessment of damages must be under the statute above mentioned and must be for pecuniary damages alone, which you must find from the evidence that plaintiff and the children on whose behalf also the action is brought have suffered.

Given. W. G. H.

Defendant excepts.

In the District Court of Thayer County, Nebraska.

BERTHA ZERNECKE, Administratrix, &c., *vs.* THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company. } Instructions on Behalf of Plaintiff.

1.

The jury are instructed that if you find from the evidence that Ernest H. Zernecke was a passenger, being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Zernecke, and that plaintiff is administratrix, and she and her children had a pecuniary interest in his life and suffered loss
27 by his death, then you should find for the plaintiff.

Given. W. G. H.

Defendant excepts.

2.

If under the evidence and instructions of the court the jury find for the plaintiff, then in assessing the damages which the plaintiff is entitled to recover the jury should assess the same with reference to the pecuniary loss sustained by the wife and children of the deceased, and in determining this you may consider the probable earnings of the deceased, his age, business capacity, experience, habits, health, bodily and mental qualities during what would probably have been his lifetime if he had not been killed, so far as these several matters have been shown by the testimony, and you may also consider the value his services might have been in the superintendence and attention to and care of his family and the education of his children, but the amount you can allow cannot exceed the sum of $5,000.00.

Given. W. G. H.

Defendant excepts.

3.

In determining the probable duration of the life of Ernest H. Zernecke, deceased, at the time of the accident, you may consider the Carlisle tables of expectancy of life, together with any other evidence in the case bearing on the question.

Given. W. G. H.

Defendant excepts.

Journal Entry.

28 BERTHA ZERNECKE, Administratrix of the Estate of Ernest H. Zernecke, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

Now, on this 18 day of November, 1896, the same being the ninth day of November, 1896, term of this court, the court convenes pursuant to adjournment, and the trial of said cause proceeds, and both parties having adduced their evidence and rested their case after argument of counsel, the court instructs the jury and sends them, in charge of the sheriff, to their jury-room to deliberate upon their verdict. Now, on the day last aforesaid, come the jury and return into open court their verdict as follows:

THE STATE OF NEBRASKA, *Thayer County*, } *ss:*

November Term, A. D. 1896, to wit, November 18, 1896.

BERTHA ZERNECKE, Administratrix, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND — RAILWAY COMPANY, Defendant.

We, the jury in this case, being duly impanelled and sworn, do find and say that we find for the plaintiff and assess her damages at the sum of forty-five hundred dollars ($4,500.00).

JAMES McBETH, *Foreman.*

And afterwards, on the 19 day of November, 1896, there was filed in the office of said clerk a motion for new trial in words and figures following, to wit:

In the District Court of Thayer County, Nebraska.

THE STATE OF NEBRASKA, *Thayer County,* } ss:

BERTHA ZERNECKE, Administratrix of the Estate of E. H. Zernecke, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company, Defendant.
} Motion for a New Trial.

Comes now the defendant and moves the court to set aside and vacate the verdict of the jury and order a new trial herein for the reasons:

1st. Irregularity in the proceedings of the court by which the defendant has been prevented from having a fair trial.

2. Misconduct of the jury and the plaintiff by which the defendant was prevented from having a fair trial.

3. Accident and surprise, against which prudence could not have guarded.

4. The damages are excessive, appearing to have been given under the influence of passion and prejudice.

5. The verdict is against the evidence.

6. The verdict is contrary to the evidence.

7. The verdict is contrary to law.

8. The verdict is not sustained by sufficient evidence.

9. Errors of law occurring at the trial, to which the defendant duly excepted at the time.

10. The court misdirected the jury in matters of law.

11. The court erred in giving to the jury instruction number one of the instructions given the jury on the court's own motion.

12. The court erred in giving to the jury instruction number two of the instructions given the jury on the court's own motion.

13. The court erred in giving to the jury instruction number three of the instructions given the jury on the court's own motion.

14. The court erred in giving to the jury instruction number four of the instructions given the jury on the court's own motion.

15. The court erred in giving to the jury instruction number five of the instructions given to the jury on the court's own motion.

16. The court erred in giving to the jury instruction number six of the instructions given to the jury on the court's own motion.

17. The court erred in giving to the jury instruction number seven of the instructions given the jury on the court's own motion.

18. The court erred in giving to the jury instruction number one of the instructions given on request of the plaintiff.

19. The court erred in giving to the jury instruction number two of the instructions given on request of the plaintiff.

20. The court erred in giving to the jury instruction number three of the instructions given on request of the plaintiff.

21. The court erred in refusing to give to the jury instruction number one of the instructions requested by the defendant.

22. The court erred in refusing to give to the jury instruction number three of the instructions requested by defendant.

23. The court erred in refusing to give to the jury instruction number two of the instructions requested by defendant.

24. The court erred in modifying instruction number three requested by the defendant, and erred in giving said instruction as modified.

25. The court erred in excluding competent and proper evidence offered by the defendant.

25½. The court erred in allowing plaintiff to introduce testimony, over the objections of defendant interposed at the beginning of the taking of testimony, that the petition does not state facts sufficient to constitute a cause of action against the defendant and in favor of the plaintiff.

31 26. The court erred in excluding and refusing to admit the testimony of the witness Harry Foote, showing the condition of the railroad track, bridge, and trestle-work at the place of the wreck shortly after the wreck occurred; to which defendant duly excepted.

26½. The court erred in excluding and refusing to admit the testimony of the witness Harry Foote as to the speed at which the train in question had been run and operated for several months immediately prior to the time of the wreck in question; to which defendant duly excepted.

27. The court erred in refusing to admit the answer- of the witness Harry Foote to questions numbered 19 to 37, inclusive, and erred in refusing to admit each of them; to each of which rulings the defendant duly excepted.

28. The court erred in sustaining the objections of the plaintiff to the question- numbered nineteen to thirty-seven, inclusive, in the deposition of Harry Foote, and erred in sustaining plaintiff's objections to each of said questions; to each of which rulings of the court defendant duly excepted.

29. The court erred in excluding, on objection of plaintiff, the answers of the witness Harry Foote to questions numbered nineteen to thirty-seven, inclusive, and erred in sustaining plaintiff 's objections to each of said questions, and erred in excluding each of the answers to each of said questions.

30. The court erred in excluding, on objection of plaintiff, the answer- of the witness Lewis Ryan to questions numbered one to thirty-three, inclusive, and fifty-two, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

31. The court erred in excluding, on objection of plaintiff,
32 the answers of the witness Ernest Shellenberger to questions numbered fifty-three to sixty-seven, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

32. The court erred in excluding, on objection of plaintiff, the

answers of the witness Fred Foster to questions numbered eighty-seven to one hundred and three, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

33. The court erred in excluding, on objection of plaintiff, the answers of the witness Bert Foster to questions numbered one hundred and five to one hundred and thirty-six, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

34. The court erred in excluding, on objection of plaintiff, the answers of the witness W. E. Painter to questions numbered one hundred and sixty-seven to one hundred and ninety-two, inclusive, and two hundred and eight to two hundred and eleven, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

35. The court erred in excluding, on objection of plaintiff, the answers of the witness Bert Cambridge to questions numbered two hundred and twelve to two hundred and thirty-two, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

36. The court erred in excluding, on objection of plaintiff, the answers of the witness Miss Lettie Seidell to questions numbered two hundred and thirty-seven to two hundred and sixty-seven, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions,

37. The court erred in excluding, on objection of plaintiff, the answers of the witness Alonzo Cambridge to questions numbered two hundred and seventy-one to two hundred and eighty-six, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

33 & 34

38. The court erred in excluding, on objection of plaintiff, the answers of the witness Ernest Tyrer to questions numbered two hundred and eighty-seven to three hundred and ten, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

39. The court erred in excluding, on objection of plaintiff, the answers of the witness Walter Sidell to questions numbered three hundred and eleven to three hundred and seventy-three, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

40. The court erred in excluding, on objection of plaintiff, the answers of the witness William Weemes to questions numbered four hundred and four to four hundred and thirty-four, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

41. The court erred in excluding, on objection of plaintiff, the answers of the witness William Lonsdale to questions numbered four hundred and thirty-five to four hundred and fifty-seven, inclusive, and erred in sustaining the plaintiff's objections to each of

said questions, and erred in excluding the answers to each of said questions.

42. The court erred in excluding, on objection of plaintiff, the answers of the witness Fred Lonsdale to questions numbered four hundred and fifty-eight to four hundred and eighty-six, inclusive, and erred in sustaining the plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

43. The court erred in excluding, on objection of plaintiff, the answers of the witness O. B. Ramey to questions numbered four hundred and eighty-seven to five hundred and sixteen, inclusive; five hundred and seventy-seven to five hundred and eighty-one, inclusive; six hundred to six hundred and four, inclusive, and
35 six hundred and six to six hundred and seven, inclusive, and erred in sustaining the plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

44. The court erred in excluding, on objection of plaintiff, the answers of the witness Mrs. Nettie Collier to questions numbered six hundred and thirteen to six hundred and thirty-two, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

45. The court erred in excluding the evidence of the witness J. M. McKimstry, offered by the defendant, showing the condition and character of the defendant's railroad track, trestle-work, and bridge and the appliances thereof at the place where it is claimed the deceased was killed and on the evening of August 9, 1894, before the wreck in question occurred and before the train referred to in plaintiff's petition was derailed.

46. The court erred in excluding the evidence of the witness J. M. McK-mstry, offered by the defendant, showing the condition of the defendant's railroad track, bridge, and trestle-work and the appliances thereof on the night of the wreck in question and after the train referred to in plaintiff's petition was derailed.

47. The court erred in excluding the evidence of the witness G. J. Bishop, offered by the defendant, showing the condition and character of the defendant's railroad and track and bridge at the place where it is claimed the deceased was killed and on either side thereof before and after the derailment of the train referred to in plaintiff's petition and at all times in question.

48. The court erred in excluding the evidence of the witness C. H. Cherry, offered by the defendant, showing the manner and the speed at which the train in question was being run and operated at the time it is claimed the deceased was killed and the manner and speed at which it was customary to operate and run said train over the track at the place in question and at other places, and that he had in his possession at the time of said derailment the passes and
36 money referred to in said offer of his testimony.

49. The court erred in excluding the evidence of the witness R. M. Day, offered by the defendant, showing the condition and

character of the defendant's railroad at the place where it is claimed the deceased was killed and on either side thereof before and after the death of the deceased, and showing that said railroad extended in a straight line and on a tangent in either direction from the place where the train in question was derailed, and that the derailment occurred at a place on said track where there was no curve, and also showing the kind and character of the most skilfully and prudently conducted railroads in the United States, and the kind and character of material used in the construction and maintenance of the defendant's railroad at all points in question, and showing the manner in which and speed at which trains on the defendant's railroad and on other railroads were at all times in question run and operated.

50. The court erred in excluding the evidence of the witness Miss Lettie Seidell, offered by the defendant, showing the condition of the defendant's railroad at all places in question within a few minutes after the derailment of the train in question, and showing that witness found the passes and money referred to in the offer of her testimony at the time and place stated in said offer.

51. The court erred in sustaining the exceptions of plaintiff, filed November 17, 1896, to the depositions of the witnesses Lewis Ryan, Ernest Shellenberger, Fred Foster, Bert Foster, William E. Parnler, Fred Lonsdale, O. B. Ramey, Nettie Collier, Bert Cambridge, Lettie Sidell, Alonzo Cambridge, Ernest Tyrer, Walter Sidell, William Weenes, Harry Foote, William Lonsdale, and erred in sustaining the exceptions to each of said depositions, and erred in sustaining plaintiff's said exceptions to each question contained in each of said depositions.

52. The court erred in admitting in evidence the certified
37 copy of the letters of administration of plaintiff, offered by the plaintiff, in evidence.

53. The court erred in admitting, over the objection and exception of the defendant, improper evidence and incompetent evidence.

54. The verdict should have been for the defendant.

55. The court should have instructed the jury to find for the defendant.

56. The court failed to properly instruct the jury with reference to the law of the case.

57. The petition does not state facts sufficient to constitute a cause of action against the defendant and in favor of the plaintiff.

58. The court erred in instructing the jury as follows:

5. "The statutes of this State provide that railroad companies shall be liable for all damages inflicted upon the person of passengers while being transported over their roads except in certain cases, which are not important in this case, as neither of them are alleged to have occurred here, and consequently, in my opinion, it is not necessary that you consider whether or not defendant was guilty of any neglect in managing its trains and road, and the evidence relating to that question, which has been tendered by defendant, has been excluded, and you will not allow it, in any manner, to influence your verdict in this case."

The defendant excepted at the time to each of the errors above assigned.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
By W. F. EVANS,
I. W. BILLINGSLEY, AND
R. J. GREENE, *Its Attorneys.*

38 *Journal Entry.*

BERTHA ZERNECKE, Administratrix of the Estate of Ernest H. Zernecke, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

Now, on this 19 day of November, 1896, the same being the tenth day of November, 1896, term of this court, comes the defendant and filed its motion in writing for a new trial.

Now, on the day last aforesaid, said cause coming on for hearing upon the motion of the defendant for a new trial, and the same being submitted to the court, and the court, being fully advised in the premises, overrules said motion and refuses to vacate and set aside the verdict of the jury and grant the defendant a new trial; to which ruling and action of the court in overruling said motion for a new trial and refusing to grant the defendant a new trial the defendant duly excepts at the time, and forty days from the adjournment of the court *sine die is* hereby granted the defendant in which to reduce to writing its exceptions and submit the same to the plaintiff or her attorney of record for examination and amendment.

It is therefore considered and adjudged by the court that the plaintiff do have and recover of and from the defendant the sum of 4,500.00, with interest thereon at the rate of seven per cent. per annum, and costs of suit, taxed at $—; to which action of the court in rendering said judgment and to each and every part thereof defendant excepts.

Court adjourned *sine die* for the November term, November 21, 1896.

39 THE STATE OF NEBRASKA, } ss:
Thayer County, }

I, Geo. W. Wasson, clerk of the district court of the seventh judicial district of Nebraska within and for said county, do hereby certify that the above and foregoing are full, true, and correct copies of the petition, answer, reply, exceptions of plaintiff to depositions and rulings of the court thereon, exceptions of defendant to depositions and rulings of the court thereon, the instructions of the court and exceptions thereto, the instructions requested by plaintiff and given by the court and exceptions thereto, the instructions requested by defendant and refused by the court and exceptions thereto, the motion for a new trial, ruling of the court on motion for a new trial, together

with proceedings of trial, judgment of the court, and all proceedings had and done in above-entitled cause, wherein Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, is plaintiff and The Chicago, Rock Island and Pacific Railway Company is defendant, as the same appear fully upon the records and files of said court, and now in my charge remaining as clerk aforesaid.

I hereby further certify that attached hereto is the original bill of exceptions in this cause filed on the 8 day of January, 1897.

In witness whereof I have hereunto set my hand officially and attached the seal of said court, at Hebron, Nebraska, this 15th day of January, 1897.

GEO. W. WASSON,

[SEAL.] *Clerk District Court, Thayer County, Nebraska.*

Fee of this transcript, $10.45.

40 Endorsed: 9149. Chicago, R. I. & P. R'y *vs.* Bertha Zernecke, adm'x. Transcript. Supreme court of Nebraska. Filed April 16th, 1897. D. A. Campbell, clerk.

And on the same day, to wit, the 16th day of April, 1897, there was filed in the office of the clerk of said court a certain bill of exceptions in words and figures following, to wit:

BERTHA M. ZERNECKE, Administratrix,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD Company.
} Defendant's Bill of Exceptions.

In the District Court of the Seventh Judicial District within and for Thayer County, Nebraska.

BERTHA N. ZERNECKE, Administratrix, Plaintiff,
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD Company, Defendant.
} Defendant's Bill of Exceptions.

Appearances: Stewart & Munger, Richards & Dinsmore, for plaintiff; W. F. Evans, J. E. Dollman, L. W. Billingsley, R. J. Greene, for defendant.

Tried to the court, the Honorable W. G. Hastings, & a jury.

Be it remembered that on the 17th day of November, 1896, that being one of the days of the regular November, 1896, term of the district court in and for Thayer county, Nebraska, the above-
41 entitled cause came on to be heard before the Hon. W. G. Hastings, judge presiding, and a jury; that on the trial of said cause on said day the plaintiff and defendant, to maintain the issues joined on their respective parts, introduced and offered before the said court and jury the following oral and documentary evidence and interposed the objections and took the exceptions herewith noted:

BERTHA ZERNECKE, Administratrix, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Received of L. W. Billingsley and R. J. Greene for examination and amendment a draft of a bill of exceptions in the case of Bertha Zernecke, adm'x, *v.* Chicago, Rock Island & Pacific Railway Company, tried in the district court of Thayer county, at the November term, 1896.

STEWART & MUNGER,
Attorney for Bertha Zernecke, Adm'x.

Dated December 26, 1896.

I hereby return the draft of the bill of exceptions in the case of Bertha Zernecke, adm'x, *vs.* Chicago, Rock Island & Pacific Railway Company, submitted to me on the — day of ——, 189–.

—— ——.

Dated —— —, 189–.

STATE OF NEBRASKA, }
Saline County, } *ss:*

I hereby certify that the within and foregoing is a true transcript of the evidence, both oral and documentary, adduced or offered on the trial in the above-entitled cause, together with all the objections made the grounds therefor, and the rulings thereon, at the regular November, 1896, term of the district court in and for Thayer county, Nebraska.

42

E. W. CARY,
Official Reporter.

Received this bill of exceptions for examination on this — day of ——, 189–, and returned the same without any amendments to suggest or objections thereto.

—— ——,
Att'ys for —.

I hereby certify that the foregoing bill of exceptions contains all the testimony introduced or offered by the plaintiff and defendant on the trial of the above-entitled cause, together with all the objections interposed, the grounds therefor*m*, the rulings thereon and the exceptions taken thereto, and I hereby approve, sign and settle the same as the bill of exceptions of said cause in said court on this — day of December, 1896.

—— ——,
Judge of the 7th Judicial District of Nebraska.

In the District Court of Thayer County, Nebraska.

BERTHA ZERNECKE, as Adm'x, etc., Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

The plaintiff above named hereby returns the draft of the bill of exceptions proposed in the above case by the defendant, and proposes the following amendments thereto:

1st. On page 245, at the close of Plaintiff's Exhibit 1, instead of the signature "S. T. Achman, county judge," etc., let the signature be "S. T. Cochran, county judge," etc.

2nd. On page 124, at the close of the language used by the
43 court, ending with the words "Ernest H. Zernecke was not on the train," insert after these words a question mark or interrogation point and the answer by defendant's attorneys of "No, sir." to the question.

3rd. On page 25, at the close of the words in ink, "the same is set out herein on page 246," let there be added, "marked Exhibits 2 and 3."

4th. At the close of page 245 and following it let there be added as Exhibit 2 the Exhibit 2 attached to these proposed amendments as the title page of the book offered in evidence on page 25, and let there be attached as Exhibit 3 the following, as Exhibit 3, being the part of the Carlisle tables offered on page 25:

EXHIBIT 3.

That portion on page 439 of Maxwell's Practice in Justice Courts.

Carlisle table of expectation of life.

Age, 39; prospect of life, 28, 29.

5th. On pages 26 and on each and every page following to and including page 113, to each offer of evidence made by defendants on said pages and before the refusal and denial of each offer by the court, let there appear the same objection to the offer made by the plaintiff that was made by the plaintiff to the question immediately preceding the offer.

STEWART & MUNGER,
Attorneys for Plaintiff.

A treatise on the powers and duties of justices of the peace, sheriffs, coroners, and constables in the State of Nebraska, with appropriate form, together with a concise statement of the law relating to accord and satisfaction, animals, arbitration and award, arrest and bail, assignment, attachment, bailment, bastardy, contempts, corporations, damages, deeds, domicile, dower, estrays, executors and administrators, filing instruments, forcible entry and detention, fraud, fraudulent conveyances, guaranty, husband and wife, infants, inn-keepers, insurance, interest and usury, liens, limitations
44 of actions, marks and brands, marriage, mortgages of chattels, negligence, notaries public, overseers of the poor, partition fences, partnership, payment, principal and agent, principal and surety, promissory notes and bills of exchange, railroads, replevin, sales, set-off and counter-claim, tender and offer to allow judgment to be taken, tenant's time, towns, etc. (police courts), trespass, trustees of an express trust, warehousemen, work and labor, limitation of criminal actions, criminal procedure, etc., etc., etc.

By Samuel Maxwell, one of the judges of the supreme court of Nebraska.

Fifth edition, revised and enlarged.

Lincoln, Nebraska.
State Journal Company, law publishers.
1888.

EXHIBIT 3.

That portion of page 439 of Maxwell's Practice in Justice Courts.

Carlisle tables of expectation in life.

Age, 39; prospect of life, 28, 29.

Received the within draft of bill of exception-, with 5 above-proposed amendments from Stewart & Munger, attorneys for plaintiff, and accept said amendments.
January 2nd, 1897.

W. F. EVANS,
T. W. BILLINGSLEY, &
R. J. GREENE,
Att'ys for Defendant.

Jury sworn to try the case.

The plaintiff offers in evidence the deposition of A. J. MCCLAIN.
The defendants now object to the introduction of any evidence in this case for the reason that the petition does not state facts sufficient
to constitute a cause of action in favor of the plaintiff as
45 against the defendant. The objection is overruled; to which the defendant's counsel except. Plaintiff's counsel proceeds to read the deposition offered.
The defendant's counsel objects to question marked one in the deposition "Where does that road lead from this town pump?" as in-

competent, immaterial, and irrelevant; which objection is overruled, and defendant excepts. The defendant moves to strike out the answer. The motion is overruled; to which the defendants except. The defendant's counsel moves to strike out all the testimony of this witness given in said deposition as incompetent, immaterial, and irrelevant and indefinate and not tending to show that the deceased was on the train at the time. The objection is overruled for the present, and the defendant excepts. The plaintiff objects to any objections being made not incorporated in the deposition. Said deposition is admitted and read in evidence and is hereinafter set out, commencing on page 137. The plaintiff now offers in evidence the deposition — Eliza Obermeyer; to which the defendants object as incompetent, immaterial, and irrelevant. The objection is overruled; to which the defendant except-.

It is admitted by the parties and agreed that the witnesses whose depositions have been taken by the plaintiff are non-residents of Thayer county, Nebraska.

46 The defendants object to question 3 in the above deposition as incompetent, immaterial, and irrelevant.

Objection is overruled; to which the defendants except.

Question No. 4 is objected to as incompetent, immaterial, and irrelevant. Objection is overruled; to which the defendants except.

Question 5 is objected to by defendants as incompetent, immaterial, and irrelevant. Objection is overruled; to which defendants except.

Defendants objection to question 7 as incompetent, immaterial, and irrelevant. Objection is overruled; to which the defendants except.

Question 8 is objected to as incompetent, immaterial, and irrelevant. The objection is overruled; to which the defendants except.

Question 9 is objected to as incompetent, immaterial, and ir-elevant and too indefinite. The objection is overruled; to which defendants except.

Said deposition is admitted and read in evidence and is hereinafter set out, commencing on page 136.

The defendants now move to strike out the testimony of Eliza Obermeyer as incompetent, immaterial, and irrelevant and too indefinite. The motion is overruled; to which the defendants except.

The plaintiff now offers in evidence the deposition of W. P. CROZIER.

The defendant objects to question 1 as incompetent, immaterial, and irrelevant and too indefinite. Objection is overruled; to which the defendant excepts.

47 The defendants objects to question 2 as incompetent, immaterial, and irrelevant and too indefinite. The objection is overruled; to which defendants except.

The defendant objects to question 3 as incompetent, immaterial, and irrelevant and too indefinite.

The objection is overruled; to which the defendant excepts. The

defendant objects to question 5 as incompetent, immaterial, and irrelevant and too indefinite. The objection is overruled; to which defendant excepts.

Defendant objects to question 6 as incompetent, immaterial, and irrelevant and too indefinite; which objection is overruled; to which defendant excepts.

Defendants object to question 7 as incompetent, immaterial, and irrelevant and indefinite. Objection is overruled; to which the defendants except.

Question 8 is objected to as incompetent, immaterial, and irrelevant and too indefinite. Objections overruled; to which defendants except.

Question 9 is objected to as incompetent, immaterial, and irrelevant and too indefinite. The objection is overruled; to which the defendants except.

Question 10 is objected to as incompetent, immaterial, and irrelevant and too indefinite. The objection is overruled; to which the defendants except.

Question 11 is objected to as incompetent, immaterial, and irrelevant and too indefinite. The objection is overruled; to which the defendants except.

Question 12 is objected to as incompetent, immaterial, and irrelevent and too indefinite. The objection is overruled; to which the defendants except.

Question 13 is objected to as incompetent, immaterial, and irrelevant and too indefinite. The objection is overruled; to which the defendants except.

Question 14 is objected to as incompetent, immaterial, and irrelevant; which objection is overruled, and defendants except.

48 Question 15 is objected to as incompetent, immaterial, and irrelevant and too indefinite. Objection is overruled; to which the defendants except.

Question 16 is objected to as incompetent, immaterial, and irrelevant and too indefinite; which objection is overruled; to which the defendants except.

Question 17 is objected to as incompetent, immaterial, and irrelevant and too indefinite; which objection is overruled; to which defendants except.

Question 18 is objected to as incompetent, immaterial, and irrelevant and too indefinite; which objection is overruled; to which the defendants except.

Question 19 is objected to as incompetent, immaterial, and irrelevant and too indefinite; which objection is overruled; to which the defendants except.

Question 20 is objected to as incompetent, immaterial, and irrelevant and too indefinite; which objection is overruled; to which defendants except.

Question 21 is objected to as incompetent, immaterial, and irrelevant and too indefinite; which objection is overruled; to which the defendants except.

Question 22 is objected to as incompetent, immaterial, and irrele-

vant and too indefinite; which objection is overruled; to which the defendants except.

Question 22 is objected to as incompetent, immaterial, and irrelevant and too indefinite; which objection is overruled; to which defendants except.

Question 23 is objected to as incompetent, immaterial, and irrelevant and too indefinite; which objection is overruled; to which defendants except.

Said deposition is admitted and read in evidence and is hereinafter set out, commencing on page 133.

49 The plaintiff's counsel now offers in evidence the deposition of CHARLES COPP.

Question 2 is objected to as incompetent, immaterial, and irrelevant; which objection is overruled; to which defendants except.

Question 3 is objected to as incompetent, immaterial, and irrelevant; which objection is overruled, and defendants except.

Question 4 is objected to as incompetent, immaterial, and irrelevant; which objection is overruled; to which defendants except.

Question 5 is objected to as incompetent, immaterial, and irrelevant; which objection is overruled, and defendants except.

Question 7 is objected to as incompetent, immaterial, and irrelevant; which objection is overruled, and defendants except.

Question 8 is objected to as incompetent, immaterial, and irrelevant and not the best evidence.

COURT: Any statements about tickets you may leave out, the rest you can give. Defendants except. All matter pertaining to the ticket in said deposition is omitted.

Question 10 is objected to as incompetent, immaterial, and irrelevant. Overruled; to which defendants except.

Question 11 is objected to as incompetent, immaterial, and irrelevant; which objection is overruled, and defendant excepts.

Question 12 is objected to as incompetent, immaterial, and irrelevant; which is overruled, and defendant excepts.

Question 13 is objected to as incompetent, immaterial, and irrelevant, and is overruled; to which defendant excepts.

Question 14 is objected to as incompetent, immaterial, and irrelevant; which is overruled, and defendant excepts.

Question 15 is objected to as incompetent, immaterial, and irrelevant; which is overruled. Exception.

Question 16 is objected to as incompetent, immaterial, and irrelevant; which is overruled, and defendant excepts.

Question 17 is objected to as incompetent, immaterial, and irrelevant; which is overruled, and defendant excepts.

50 The plaintiff also offers in evidence the picture attached as an exhibit to the deposition of C. Copp.

The defendants object on the ground that the witness testified that it was Ernest Zernecke, and the picture encumbers the record and is incompetent. The objection is overruled and the picture is shown the jury.

Defendant excepts. Said deposition is admitted and read in evidence and is hereinafter set out, commencing on page 141.

Recess 7.30 p. m.

The plaintiff offers in evidence the deposition of J. C. Puetz.

(COURT:) You will omit that part in reference to the speed of the train.

Objection to question marked 2 by the reporter is sustained.

Objection to question marked 2, "What indications, if any, were there as to the speed of the train, did you notice?" is sustained.

Question marked 3 by the reporter, "Just describe how the train was wrecked," is overruled; to which defendants except.

Question marked 4, "Were any of the parties taken out of the smoker?" the objection is overruled, and defendants except.

Said deposition is admitted and read in evidence, and is hereinafter set out, commencing on page 148.

Plaintiff now offers in evidence the deposition of WALTON G. ROBERTS, which is objected to by defendants as incompetent, immaterial, and irrelevant. Objection is overruled; to which the defendants except.

Said deposition is admitted and read in evidence, and is hereinafter set out, commencing on page 152.

The defendants move to strike out the deposition or evidence of the witness given in the deposition as not tending to establish that the deceased or the person whose death is complained of was among the killed.

Motion is overruled, and defendants except.

Mrs. BERTHA ZERNECKE, *is* called to the witness stand in her own behalf, on being duly sworn and questioned by Mr. Munger, testified as follows:

Q. You are the wife of Ernest H. Zernecke?

51 A. Yes, sir.

Q. When were you married?

A. In 1882.

Q. Where?

A. In Council Bluffs.

Q. How many children did you have, you and Mr. Zernecke, at the time of his death?

A. Three at the time of his death.

Q. How many are living now?

A. Three.

Q. What is their names?

A. Zelda, Marie, and Carl.

Q. How old is Zelda?

A. Ten.

Q. She is a girl?

A. Yes, sir.

Q. And Marie?

A. Eight.

Q. How old is Carl?
A. Three and a half.
Q. Where were you living on the 9th of August, 1894?
A. On Wood street.
Q. In what city?
A. Lincoln.
Q. What county and State?
A. Lancaster county, State of Nebraska.
Q. You had been living in Lincoln how long, about?
A. I think nine or ten years.
Q. What was your husband's age on the 9th of August, 1894?
A. 39.
Q. What was your age at that time?
A. 30.
Q. What was his business at that time?
A. He was an abstractor & bonded abstractor.
Q. When did you last see Mr. Zernecke, your husband?
A. The day before the wreck.
Q. What wreck do you refer to?
A. The Chicago and Rock Island wreck.
Q. You say the daday before, what day do you mean?
A. The 8th of August.
Q. Do you mean the day the wreck occurred or the day preceding?
A. The day before the wreck occurred.
Q. Was he leaving or contemplating leaving Lincoln at that time?

To which the defendants object as incompetent and immaterial. No ruling and no answer and another question is asked by plaintiff's counsel.

Q. Did he go away from Lincoln that day?
A. Yes, sir; he left with a man from Council Bluffs.
Q. What was the man's name?
A. Henry Peters. He had been corresponding with the man. I saw the letters of Mr. Peters.
(By Mr. EVANS:) Either from letters or what he told you, was it?
A. Yes, sir.

The defendant objects to the evidence as incompetent, immaterial, and not the best evidence. (No ruling for the present and another question is asked witness.)

Q. Where was he going?

To which the defendants object as incompetent, immaterial, and relevant and not the best evidence, and for the further reason that the witness has already stated that what she knows is derived from letters or what the deceased, her husband, told her. The objection overruled, and the defendant excepts.

A. To Sprague or Martelle; I do not know.
Q. Where was this station?

A. I cannot tell exactly.

53 Q. In this State, was it?

A. Yes, sir; it was only a short distance.

Q. Which way from Lincoln?

A. South, I think.

Q. In Lancaster county, was it?

A. I think so. It was only a short distance, because he expected to be back.

Q. When?

A. That night.

Q. The night of the day he left?

A. Yes, sir.

The defendants object, and move to strike out the answer as incompetent, immaterial, and irrelevant, and because it must have been derived from a conversation with the deceased.

(COURT:) All that is competent as to that is not her impression, but what was said when he left. Defendants except.

Q. What was the immediate purpose of his going to Sprague?

Objected to by defendants as incompetent, immaterial, and irrelevant. The objection is sustained; to which plaintiff excepts.

Q. Did he ever come back?

A. No, sir.

Q. Have you ever seen or heard from him since?

To which the defendants object as incompetent, immaterial, and irrelevant to the question as a whole, but no objection to the first part. Further objection that it is not the best evidence. The objection is sustained for the present.

Q. Have you ever seen him since?

A. No, sir.

Q. Have you ever heard from him since?

To which the defendants object as incompetent, immaterial, and irrelevant. The objection is overruled; to which the defendant excepts.

54 A. No, sir.

Q. Were you at the scene of the wreck on the Chicago, Rock Island and Pacific R. R.? Did you go to the scene of the wreck?

A. I did after the burial.

Q. Were you there for three or four days afterwards?

A. No, sir.

Q. Did you go to W. G. Roberts' undertaking rooms after the wreck occurred?

A. Yes, sir.

Q. When was that?

A. I was there several times.

Q. The first time you went there was how long after the wreck occurred?

A. The next day, I think; I do not remember whether it was just before or after noon.

Q. Did you see any of the bodies there from the wreck?

A. Yes, sir; I saw all of them.

Q. Did you see any of the material or substance that was connected with the bodies there?

A. Yes, sir.

Q. Did you see anything there that you recognized as belonging to Mr. Zernecke?

A. Yes, sir.

Q. What was that?

A. The best of the clothing, I think, was a part of the pants he wore when he left.

Q. In what way did they seem to be a part of them?

A. Because they were the same—they looked like the same material.

Q. What was their condition?

A. Very badly charred, but there was a little check I could tell; the color also; it was burned, but I could tell the material.

Q. That is, it compared with the pants he wore when he left?

55 A. It looked like a part of the pants he wore when he left.

Q. Did you see anything else there that you recognized as belonging to Mr. Zernecke?

A. No, sir.

Q. Did you recognize any of the remains that were there?

A. No, sir; nothing but the skull.

Q. What did you see about the skull?

A. Mr. Zernecke——

Q. In what condition was it, as near as you can describe?

A. You mean the condition of the remains?

Q. Yes.

A. The head was parted from the body.

Q. How did it look to look at it; this jury didn't see it?

A. It looked like a man's head; it looked like Mr. Zernecke's, because his was very large across the top.

Q. Did it have the appearance as if it had been burned in any way in the fire, in the heat?

A. Certainly it did; yes, sir.

Q. Tell the jury about that.

To which the defendants object as incompetent, immaterial, and irrelevant, and for the further reason that the — body referred to by the witness were those of a dead person and whether they were burned or not is immaterial. No ruling and no answer.

Q. Tell the jury what you could see about the features, if anything.

A. As I stated, the skull and everything was burned.

Q. Was the nose and ears or hair or any portion of it remaining on it?

A. No, sir.
Q. Did the trunk show the appearance of having been burned?
A. Yes, sir.
Q. How did the condition of it compare with that of the other bodies there?

56 To which the defendant objects as incompetent, immaterial, and irrelevant, and for the reason it is the purpose to get this before the jury so as to create feeling. The objection is sustained; to which the defendants except.

Q. Were there any articles there among the substances of the body that you procured?
A. Yes, sir; Mr. Roberts gave me a key which he said had been found——

Defendants object as incompetent, immaterial, and irrelevant. Objection is sustained, and the plaintiff excepts.

Q. What did you get there?
A. A key.
Q. Have you got that key with you?
A. Yes, sir.
Q. Produce it, please.

Witness produces key.

Q. Did you ever see that key before that wreck occurred?
A. Yes, sir.
Q. Where and when?
A. In his vest pocket.
Q. How long before the wreck occurred?
A. The day before.
Q. Under what circumstances did you see it?
A. I cleaned this vest and this key was in it—interfered with the cleaning—and I took it out and put it back.

Plaintiff now offers the key in evidence.
Before its admission defendants desire to cross-examine the witness. Permission granted, and witness cross-examined by Mr. Evans.

Q. Who gave you this key last?
A. Mr. Roberts.

57 Q. *Do you* not know where he got it, do you, only from what he told you; all you know about that is what he told you?

A. That is all I know about it.
Whereupon the defendants object to the key as incompetent, immaterial, and irrelevant. The objection is sustained, and the plaintiff excepts.

Redirect resumed:

Q. You stated that Mr. Zerneck's business was what had been his business for four or five or six—how long had he been in Lincoln?

A. I think eight or nine years.

Q. What has been his business during that time?

A. The first four or five years he was in the county clerk's office as deputy clerk, under Mr. McClay and O. C. Bell.

Q. Then what did he do after that?

A. After he resigned there he ran for county clerk, I think——

Q. What?

A. He started an abstract office, and he was a book-keeper and accountant; he made abstracts; that was his business until the time of his death.

Q. Until the time of his death?

A. Yes, sir.

Q. What was Mr. Zerneck's condition as to health at the time of his death?

A. Very good.

Q. How had it been during years prior to his death?

A. He was always well.

Q. What was his physical condition as to weakness or strength; was he a strong man?

A. Yes, sir; he was a strong man.

Q. Was he robust and hearty?

A. Yes, sir.

Q. Do you know whether he was an educated man?

A. Yes, sir; he was a graduate of one of the best German universities.

58 Q. He spoke what languages?

A. He spoke German and English fluently, and spoke some French and Latin.

Q. He was what kind of a man in his attention to his business in the years prior to his death? Describe in general to the jury.

A. He always attended strictly to whatever business he had to do or he could not have filled the positions he did.

Q. Was he engaged in any other occupation or anything else that took his time outside of his business?

A. No; only when he examined the sheriff's books; a little book-keeping or something like that.

Q. What do you mean by examining the sheriff's books?

A. There was a deficiency in the sheriff's books of Lancaster county and he was appointed one to examine them.

Q. How long was that before his death?

A. I think two years or a year. I do not recollect exactly how long.

Q. What compensation did he receive for that?

To which the defendants object as incompetent, immaterial, and irrelevant and too indefinite.

No ruling and no answer.

Q. How long was he engaged in that?

A. For several months.

Q. Was that in the course of his business as accountant?

A. Yes, sir.

Q. What compensation, if you know, did he receive for that?

Objected to as incompetent, immaterial, and irrelevant and too indefinite. Objection is sustained; to which plaintiff excepts, and plaintiff offers to prove by the witness on the stand that about a year prior to the death of Mr. Zernecks that he was employed as an expert accountant to examine the treasurer's books, and received the sum of four hundred dollars for such services as accountant;
59 to which the defendants object as incompetent, immaterial, and irrelevant and too indefinite. The objection is sustained, and plaintiff excepts.

Q. In what way did you and the children obtain your support during Mr. Zerneck's life, from him?

A. From him.

Q. Do you have any means of support?

A. No, sir.

Q. These three children were all members of one family?

A. Yes, sir.

Q. Both your children and his?

A. Yes, sir.

Q. Did you have charge of the household affairs during your married life?

A. More or less; yes, sir.

Q. Do you know about the family expenses during that time? State whether or not you know.

A. Yes, sir.

Q. You may state about what the family expenses for the support and maintenance amounted to per month prior to his death.

To which the defendants object as incompetent, immaterial, and irrelevant. The objection is overruled; to which the defendant excepts.

A. Sometimes they would average up to from seventy-five to eighty and sometimes fifty to sixty, along in there; it would depend upon just what his earnings had been.

Q. Do you own your own property?

To which defendant objects as incompetent, immaterial, and irrelevant. The witness answers before any ruling is made.

A. No, sir.

Q. Your own home, I mean?

A. No, sir.

Q. Who provided the house rent?

A. Mr. Zernecke.

60 Q. Who provided the groceries and provisions?

A. Mr. Zernecke.

Q. Who provided the living expenses of all kinds for yourself and the children——

The defendants make the objection this has been already asked and answered. The objection is sustained; to which the plaintiff excepts.

Q. Do you know about how much Mr. Zernecke was capable of earning per month prior to his death?

A. Yes, sir.

Q. State how much.

A. While he was county clerk——

Q. State how much—state the figures.

A. When he was working for himself I could not state so well as when he was working for some one else—when he was in the county clerk's office.

(By Mr. EVANS:) When was he in the county clerk's office?

A. Six years.

Q. How long before his death was he in the county clerk's office?

A. Three or four years, and after that I could not tell as to the exact amount, although at times during the boom in Lincoln he has made over two hundred dollars a month.

(EVANS:) About what time did the boom collapse?

A. I do not know just how long. I know that there was no depreciation in real estate until the last year or so before his death——

The defendant moves to strike out what the witness said as to the two hundred dollars made during the boom for the reason that it was volunteered as a statement by the witness, and it is incompetent and immaterial and it referred to a time—a number of years prior to the time his death was complained —.

(COURT:) That was brought in response to your question. It may stand.

Defendant excepts.

61 (Mr. MONGER:) You may state how much Zernecke was capable of earning prior to the time of his death.

To which the defendants object as incompetent, immaterial, and irrelevant and too indefinite. No ruling and no answer.

Q. At the time of his death?

(COURT:) If she can tell how much he was earning she can tell. Defendants except.

Q. State, if you know, about how much Mr. Zernecke was earning prior to his death—I will say immediately prior to his death.

A. I should think on an average from thirty-five to forty dollars.

Q. For how long?

A. Not long.

Q. Thirty-five to forty dollars a what?

A. A month; that was just at that time: that was not the time for real estate; at the time of his death, as I say, it depended upon the amount that was done as to how much he would make.

Q. Do you know how much he was earning in his business prior to his death—say six months or a year?

To which the defendants object as incompetent, immaterial, and

irrelevant; that the estimate must be made upon what he was earning by his own personal labor and not in his business. Question is withdrawn.

Q. You may state, if you know, what Mr. Zernecke was earning by his efforts, say, for a period of six months or a year prior to his death.

A. I don't think he would average less than fifty dollars a month.

Q. You may state, if you know, what he was earning by his efforts prior to his death, say, a year and a half or two years.

To which the defendants object as incompetent, immaterial, and irrelevant; that it is too far from the time. The question is withdrawn.

62 Q. Did he work at the same abstract business at that time? (Court.)

A. Yes, sir.

Q. Now answer the question. State if you know what he was earning by his efforts prior to his death, say, a year and a half or two years.

To which defendant objects as incompetent, immaterial, and irrelevant. Objection is overruled; to which defendant excepts.

A. Sixty dollars, I should think, would be under the average.

Q. What was Mr. Zerneck's condition at and prior to the time of his death for some months, say, mentally?

To which the defendants object on the ground that nobody is contending that he was not in good condition mentally, and it is immaterial. Sustained. Exception.

Q. Was he a man of good mental health prior to his death?

To which the defendant objects as immaterial. Sustained. Exception.

Q. What were his habits as to industry?

To which the defendants object that this has been gone over; that witness answered he attended to his business. Sustained; to which the plaintiff excepts.

Q. I will ask you what was Mr. Zerneck's disposition towards yourself at and prior to the time of his death?

To which the defendants object as incompetent, immaterial, and irrelevant. The objection is overruled. Exception.

A. It was always devoted to me and his family, in fact, remarkably so, because neighbors has mentioned it.

The defendants move to strike out the last part of the answer as to what the neighbors mentioned. Sustained.

Q. Did Mr. Zernecke have anything to do with the education and care and training of the children?

To which the defendant objects as incompetent, immaterial, and irrelevant. Sustained. Exception.

63 (Mr. EVANS:) Go ahead and tell it, Mrs. Zernecke.

A. When he was at home he devoted his time towards the care of the children.

(Mr. EVANS:) He would be a strange man if he did not.
Cross-examination none.
Witness is excused.

The plaintiff offers in evidence certified copy of the letters of administration in the matter of the estate of Ernest H. Zernecke; to which the defendant objects as incompetent, immaterial, and irrelevant and not the best evidence, and the further objection that it is not such a copy as the county judge of Lancaster county or any other judge is authorized to certify to, that it is not properly certified to. Objection is overruled, and the same are admitted and marked Exhibit 1 and hereinafter set out on pages 244 and 245.

(By a JUROR:) I would like to find out this; the witness testified that the expenses of the house and maintenance of the family was so many figures, but she did not say whether it was dollars or cents or what.

(By Mr. EVANS:) We will admit it is dollars.

Question to Mrs. Zernecke. Did you mean dollars when you said sixty?

A. Yes, sir.

The plaintiff now offers in evidence so much of page 439 of the treatise on the powers and duties of justices of the peace and sheriffs, constables, and coroners of the State of Nebraska, by Samuel Maxwell, judge of Nebraska. The title page is also offered for identifying said book and so much of the page referred to as shows the Carlisle table of expectation of life with reference to the age of one who is 39 years of age; to which offer the defendants object as incompetent, immaterial, and irrelevant, and *to* the accuracy of the tables offered in evidence, or that portion of it, has not been shown. The objection is overruled, and defendant excepts. The same is set out herein on page 346.

64 The plaintiff offers the whole title page to identify the book it is found in. The defendant makes the same objection as incompetent, immaterial, and irrelevant, and that the accuracy of that portion of it offered in evidence has not been shown. The objections are overruled, and the defendant excepts, and the tables are read to the jury.

Plaintiff rests.

The defendants now offer in evidence the deposition of HARRY FOOTE; to which the plaintiff says they have no objection to the first 18 questions, and same are read, and all of said deposition was read except the following numbered questions and the answers thereto.

The plaintiff now makes the objection to question 19 in the depo-

sition of Harry Foote as incompetent, immaterial, and irrelevant. The objection is sustained; to which the defendant excepts, and the defendant offers to prove that the witness Foot would answer as follows in answer to question 19: "About how long had you been running at that speed?" Ans. "We had run that fast or faster ever since the run had been on something like a year and six months." The offer is denied and overruled by the court; to which the defendant excepts.

The plaintiff objects to question 20 as incompetent, immaterial, and irrelevant in the deposition of Foot; which objection is sustained, and the defendants except and offer to prove that *that* Foot would answer in answer to question 20: "It was the usual speed." The offer is denied and overruled by the court; to which the defendant excepts.

To question 24 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and the defendant excepts and offers to prove that the witness Foot would answer to question 24: "Tender and both cars connected with air." The offer is denied and overruled by the court; to which the defendant excepts.

To question 25 the plaintiff objects as incompetent, immaterial, and irrelevant; which objections are sustained, and to which the defendant excepts and offers to prove that the witness Foot would answer as stated in the deposition in answer to question 25: "I looked after the injured persons until I had all the injured ones taken from the train." The offer is denied and overruled by the court; to which the defendant excepts.

65 To question 27 in Foot's deposition the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained; to which defendant except- and offers to prove that the answer would be as stated in the deposition in answer to question 27: "I went up on the trestle and examined it." The offer is denied and overruled by the court; to which the defendant excepts.

To question 29 in Foot's deposition plaintiff objects as incompetent, immaterial, and irrelevant, and that there is no foundation laid; which objection is sustained, and the defendant excepts, and defendant offers to prove that if the witness Foot were permitted to answer he would answer as stated in the deposition in answer to question 29: "No, sir." The offer is denied and overruled by the court; to which the defendant excepts.

To question 30 the plaintiff objects as incompetent, immaterial, and irrelevant and not within the issues of this case; which objection is sustained, and defendant excepts, and defendant offers to prove that the witness Foot would answer in response to question 30 as set forth in the deposition: "I found a claw-bar, sometimes called a clinch-bar, a pair of *oi*bchers, an angle bar, bolts, and two nuts. The pinchers, angle bar, bolts, and nuts were found under the first joint of west end of bridge, and the claw-bar was found on the fill or bank south of the track about twenty feet. The first and second rails on the south side of the bridge and immediately east from the west end of the bridge were turned over to the south or southeast and from six to twelve inches south of the line of *line of* the rail west thereof, the second rail on the

south bent out of shape and turned farther around than the one west of it. I also examined spike-holes on the south side of the bridge which had held the south rail at the west end of the bridge in position. The condition of the holes were that the spikes must have been drawn with a claw-bar. The impression of a claw-bar or some hard instrument was on the ties at each of the spoke-holes, and the holes appeared new, or fresh, as if the spikes had been out of them only a few minutes. The nuts that I found were under the first joint east of the west end of the trestle and on the south side and
66 within a few inches of the bolts. The threads on the bolts were in good condition, as though the nuts had been removed a few minutes before. I also observed immediately east of the first joint of the west end of the bridge and on the south side marks or indentations made by the flange of the wheels of the engine and cars. These marks on the ties were on the south side of the bridges and a few inches north of the south rail, near the west end of the bridge or trestle and in line with the rail on the south side that extended west of the bridge." The offer is denied and overruled by the court; to which the defendant excepts.

The plaintiff objects to question 31 in Foot's deposition as incompetent, immaterial, and irrelevant and not within the issues of this case; which objection is sustained, and the defendants excepts, and defendant offers to prove that the witness Foot would answer in response to question 31 as follows: "In good condition; everything was in first-class condition." The offer is denied and overruled by the court; to which the defendant excepts.

To question 32 in Foot's deposition plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that Foot would answer in response to question 32 as stated in the deposition, as follows: "About one year and a half." The offer is denied and overruled by the court; to which the defendant excepts.

To question 33 in Foot's deposition the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and the defendant excepts, and defendant offers to prove that Foot would answer in response to question 33 as stated in his deposition, as follows: "Nothing while running." The offer is denied and overruled by the court; to which the defendant excepts.

To question 34 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that Foot would answer in response to question 34 as stated in the deposition, as follows: "I saw a
67 couple of farmers and a colored man, George Washington Davis, coming down off the fill of the west end of the bridge between five and ten minutes after the wreck occurred." The offer is denied and overruled by the court; to which the defendant excepts.

To question 35 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that Foot would answer in response to question 35 as stated in the deposition, as follows: "The same as it

had been since I had been on the run, with great care and caution." The offer is denied and overruled by the court; to which the defendant excepts.

To question 36 in Foot's deposition plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained; to which defendant excepts, and defendant offers to prove that Foot would answer in response to question 36 as stated in the deposition, as follows: "By engineer, fireman, baggageman, breakman, and conductor." The offer is denied and overruled by the court; to which the defendant excepts.

To question 37 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained; to which defendant excepts, and defendant offers to prove that the witness Foot would answer in response to question 37 as stated in the deposition, as follows: "About nine months." The offer is denied and overruled by the court; to which the defendant excepts. Said deposition is hereinafter set out, commencing on page 155.

The defendant now offers in evidence the deposition of LEWIS RYAN, which, with the following exceptions, was omitted and read. The questions first before stated and the answers thereto were not read.

Plaintiff objects to question 6 in the deposition of Lewis Ryan as incompetent, immaterial, and irrelevant; which objection is sustained; to which defendant excepts, and the defendant offers to prove that the witness Ryan would answer in response to question 6 as stated in his deposition, as follows: "With my cousin
68 Frank." The offer was denied and overruled by the court; to which the defendant excepts.

Defendant offers to read question 7 in Ryan's deposition; — which plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained; to which defendant excepts, and defendant offers to prove that witness Ryan would answer in response to question 7 as stated in his deposition, as follows: "Yes, sir." The offer was denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 8 in the deposition of Lewis Ryan as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that Ryan would answer in response to question 8 as stated in the deposition: "A little south of the Penn. road; what is known as the Penn. road." The offer is denied and overruled by the court; to which the defendant excepts.

The plaintiff objects to question 9 in Ryan's deposition as incompetent, immaterial, and irrelevant; which objection is sustained; to which defendant excepts, and defendant offers to prove that the witness Ryan would answer in response to question 9 as stated in the deposition, as follows: "On the Union Pacific track." The offer is denied and overruled by the court; to which the defendant excepts.

The plaintiff objects to question 10 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers

to prove that the witness Ryan would answer in response to question 10 as stated in the deposition: "It is about two blocks, I should say." The offer is denied and overruled by the court; to which the defendant at the time excepts.

The plaintiff objects to question 11 in the deposition as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that *when* Ryan would answer in response to question 11 as stated in his deposition, as follows: "Walking." The offers — denied and overruled by the court; to which the defendant excepts.

69 To question 12 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that the witness would answer in response to question 12 as stated in the deposition, as follows: "Yes, sir." The offer is denied and overruled by the court; to which the defendant excepts.

To question 13 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and the defendant excepts, and defendant offers to prove that the witness would answer in response to question 13 as stated in his deposition, as follows: "It is about between a mile and a half and two miles." The offer is overruled and denied by the court; to which the defendant excepts.

To question 14 plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that witness would answer in response to question 14 as stated in his deposition, as follows: "Three." The offer is denied and overruled by the court; to which the defendant excepts.

To question 15 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and the defendant excepts, and defendant offers to prove that the witness Lewis Ryan would answer in response to question 15 as stated in the deposition, as follows: "He was a colored man; looked something like an office official; tall; weight, between 18-, probable 190, and heavy square shoulders." The offer is denied and overruled by the court; to which the defendant excepts.

The plaintiff objects to question 16 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that witness Lewis Ryan would answer in response to question 16 as stated in his deposition, as follows: "Walking very slow, and had a shuffling gate." The offer is denied and overruled by the court; to which the defendant excepts,

70 Plaintiff objects to question 17 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and defendant offers to prove by the witness Lewis Ryan he would answer in response to question 17 as stated in his deposition, as follows: "When I was going by him, up to him, I supposed he had a gun and game-sack in his hand and over his shoulder, and when I got close up I saw it was a crow-bar." The offer is denied and overruled by the court; to which the defendant excepts.

To question 18 the plaintiff objects as incompetent, immaterial,

and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness Ryan would answer in response to question 18 as stated in the deposition, as follows: "And a sack of some coarse material." The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 19 in the above deposition as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness Lewis Ryan would answer as stated in his deposition in answer to question 19, as follows: "It was what appeared to be a gunny sack rolled up at the mouth, about a foot rolled down at the mouth, and it had an angler object in it." The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 20 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness Lewis Ryan would answer in response to question 20 as stated in his deposition, as follows: "Over his left shoulder, had hold of it with his left hand." The offer is denied and overruled by the court; to which the defendant excepts.

Question 21 is objected to as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness Lewis Ryan would answer in response to the question 21 as stated in his deposition, as follows: "We passed him twice within about three feet." The offer is denied and overruled by the court; to which the defendant excepts.

71 Question 22 is objected to by the plaintiff as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove *and offers to prove* that the witness Ryan would answer in response to question 22 as stated in the deposition: "I know it was either a crow-bar or claw-bar because I was looking at him closely when we passed." The offer is denied and overruled by the court; to which the defendant excepts.

The plaintiff objects to question 23 as incompetent, immaterial, and irrelevant; which objection is sustained, and the defendant excepts, and defendant offers to prove that the witness Ryan in response to question 23 would answer as stated in his deposition: "Two or three days after this." The offer is denied and overruled by the court; to which the defendant excepts.

Question 24 is objected to as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness Ryan would testify in response to question 24 as stated in his deposition, as follows: "At the city jail." The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 25 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that Ryan would answer in response to question 25 as stated in his deposition, as follows: "Not the first time; no." The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 26 as incompetent, immaterial, and

irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer to question 26 as stated in his deposition, as follows: "Yes, sir." The offer is denied and overruled by the court; to which the defendant excepts.

Question 27 is objected to by plaintiff as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that the witness would answer in response to question 27 as stated in his deposition, as follows:

72 "It was the same gait; slow. It was a lazy, shambling gait." The offer is denied and overruled by the court; to which the defendant excepts.

The plaintiff objects to question 28 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that the witness would answer in response to question 28 as stated in his deposition, as follows: "About half past eight." The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 29 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts and offers to prove that the witness Ryan would answer in response to question 29 as stated in his deposition: "A very dark colored suit." The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 30 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 30, as follows: "Yes, sir; I saw the coat." The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 31 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 31, as follows: "As *b*ear — I can remember, it was the same cut and same shape of coat." The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 32 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that the witness would answer in response to question 32 as stated in his deposition, as follows: "I do." The offer is denied and overruled by the court; to which the defendant excepts.

73 Plaintiff objects to question 33 as incompetent, immaterial, and irrelevant; which objection is sustained; to which defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 33: "About three or four hundred feet south of the Pen-. road and about a hundred feet to the right of the U. P. track." The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 52 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in

his deposition in response to question 52, as follows: "I made a statement to my father the next morning about eight o'clock, and that morning he made a statement to the authorities." The offer is denied and overruled by the court; to which the defendant excepts.

The above objections of plaintiff being on file with the clerk of the district court of Thayer county. Said deposition is hereinafter set out, commencing on page 163.

The defendant now offers to read in evidence the deposition of ERNEST SHELLENBERGER; to which the plaintiff offers objections as on file in the files of this court to questions and answers thereof. The same is read in evidence, with the following exceptions:

To question 54 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and the defendant excepts, and defendant offers to prove by the witness that he would answer as stated in his deposition in response to question 54, as follows: "I am." The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 55 as incompetent, immaterial, and irrelevant, and the objection is sustained; to which the defendant excepts, and defendant offers to prove that the witness would state in response to question 55 as stated in his deposition, as follows: "Known him about three years." The offer is denied and overruled by the court; to which the defendant excepts.

74 To question 56 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 56, as follows: "I was."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 57 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer in response to question 57 as stated in his deposition, as follows: "I saw him on the night of the wreck." The offer is denied and overruled by the court; to which the defendant excepts.

To question 58 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and the defendant offers to prove by the witness that he would answer as stated in his deposition in response to question 58, as follows: "Well, south of the wreck, probably about a half a mile."

The offer is denied by the court; to which the defendant excepts.

To question 59 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and the defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 59, as follows: "The Rock Island railway."

The offer is denied and overruled by the court; to which the defendant excepts.

The plaintiff objects to question 60 as incompetent, immaterial,

and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 60, as follows: "I met him south."

The offer is denied and overruled by the court; to which the defendant excepts.

75 The plaintiff objects to question 61 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 61, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

The plaintiff objects to question 62 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 62, as follows: "Marvin Crawford."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 63 as incompetent, immaterial, and irrelevant, and the objection is sustained; to which defendant excepts, and defendant offers to prove that the witness would testify as stated in his deposition in response to question 63, as follows: "I did."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 64 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer as stated in his deposition in response to question 64, as follows: "Why, he had on a dark pair of pants, I think, with a vest and no coat on."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 65 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 65, as follows: "Had no coat on at all."

The offer is denied and overruled by the court; to which the defendant excepts.

76 To question 66 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 66, as follows: "He was carrying a lantern."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 67 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer as stated in his deposition

in response to question 67, as follows: "I should judge it was about a half an hour."

The offer is denied and overruled by the court; to which the defendant excepts. Said deposition is herewith set out, commencing on page 168.

The defendant now offers in evidence the deposition of FRED FOSTER, and offers to read each question in evidence and the answers thereto, which is done, with the following exceptions:

The plaintiff objects, as shown by their recorded objections on file, as follows, to questions 87, 88, 89, 90, 91, 92, 93, 94, 95. The objection is made as incompetent, immaterial, and irrelevant; which objection is overruled, and plaintiff excepts.

To question 96 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that the witness would answer in response to question 96 as stated in his deposition, as follows: "They were all right."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 97 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer as stated in his deposi-
77 tion in response to question 97, as follows: "I was there that night."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 98 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 98, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 99 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer as stated in his deposition in response to question 99, as follows: "We crossed that particular place that very night going out over the Union Pacific track."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 100 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts and offers to prove that the witness would answer as stated in his deposition in response to question 100, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 101 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would state in response to question 101 as stated in his deposition, as follows: "It was all right."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 102 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer as stated in his deposition in response to question 102, as follows: "Not now." The offer is denied and overruled by the court; to which the defendant excepts.

78 To question 103 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer as stated in his deposition in response to question 103, as follows: "Since the 15th of last September."

The offer is denied and overruled by the court; to which the defendant excepts. Said deposition is hereinafter set out, commencing on page 171.

The defendant offers in evidence the deposition of BERT FOSTER, and offers to read each question and there answers thereto in evidence; to which the plaintiff makes the objections as on file, which are set forth as follows: To question 105 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer in response to question 105 as stated in his deposition: "Twenty-one years old; Roca, Nebraska."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 106 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 106, as follows: "Working on the Rock Island."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 107 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 107, which is as follows: "Now."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 108 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and

79 offers to prove that the answer would be as stated in his deposition in response to question 108, as follows: "My business ain't much of anything; working for the stoveware now."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 109 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 109, as follows: "About four months."

The offer 41 is denied and overruled by the court; to which the defendant excepts.

To question 110 plaintiff objects as incompetent, immaterial, and

irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in response to question 110, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 111 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in response to question 111, as follows: "To the Rock Island wreck."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 112 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 112, as follows: "Oh, about eleven or half past, as he said."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 113 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in response to
80 question 113, as follows: "I don't know just exactly when he was there before."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 114 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in response to question 114, as follows: "The same day."

The offer is denied and overruled by the court; to which the defendant excepts.

The plaintiff objects to question 115 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in response to question 115, as follows: "I don't know as—we was down there that night swimming."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 116 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in response to question 116, as follows: "We was at Rokeby."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 117 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 117, as follows: "No place; oh, we was swimming between six and nine."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 118 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in response to question 118, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

81 To question 119 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 119, as follows: "Well, about half past six, I guess."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 120 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 120, as follows: "Down to Lincoln Park swimming hole."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 121 plaintiff objects as incompetent, immaterial, and irrelevant, and the same is sustained and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 121, as follows: "On the hand car."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 122 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 122, as follows: "I couldn't tell you that."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 123 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 123, as follows: "Well, it was about a mile and a half."

The offer is denied and overruled by the court; to which the defendant excepts.

82 To question 124 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 124, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 125 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 125, as follows: "Yes, sir." The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 126 as incompetent, immaterial, and

irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 126, as follows: "Good condition."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 127 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 127, as follows: "We didn't examine it, but seen everything was all right."

The offer is denied and overruled; to which the defendant excepts.

Plaintiff objects to question 128 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 128, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which
83 the defendant excepts.

Plaintiff objects to question 129 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 129, as follows: "North."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 130 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 130, as follows: "Went over the U. P. track."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 131 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 131, as follows: "To see the U. P. train go under."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 132 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 132, as follows: "To Rokeby."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 133 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 133, as follows: "About eight o'clock."

The offer is denied and overruled by the court; to which the defendant excepts.

84 Plaintiff objects to question 134 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts.

Plaintiff objects to question 135 as incompetent, immaterial, and

irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 135, as follows: "Good condition."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 136 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 136, as follows: "All of us."

The offer is denied by the court; to which defendant excepts. Said deposition was read and admitted in evidence with the above exceptions and is set out herein, commencing on page 174.

The defendant now offers to read in evidence deposition of WILLIAM E. PAINTER and each and every question and the answers thereto; to which the plaintiff makes the objections as set forth in his objections on file in this court, which are as follows:

Plaintiff objects as incompetent, immaterial, and irrelevant to question 167; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 167, as follows: "I am chief clerk for the superintendent of the Burlington, at Lincoln."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 168 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 168, as follows: "Since 1875."

The offer is denied by the court; to which the defendant excepts.

Plaintiff objects to question 169 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and
85 offers to *to* prove that the answer would be as stated in answer to question 169, as follows: "Why, in a general way the supervision of the division under the instructions of the sup't."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 170 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 170, as follows: "In case a wreck happens it is my duty to see that proper means are taken to put it in shape; see *of* any people are injured, and see that the track is put in shape for trains."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 171 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 171, as follows: "A few; couldn't say how many."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 172 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 172, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 173 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 173, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 174 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and
86 defendant offers to prove that the answer would be as stated in the deposition in reply to question 174, as follows: "I was notified that the trestle was burning in such a manner that it was likely to fall on and endanger our track."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 175 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 175, as follows: "About one o'clock a. m."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 176 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 176, as follows: "Yes, sir; a casual one."

The offer is denied and overruled by the court; to which the defendant excepts.

To question 177 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 177, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 167 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 167 A, as follows: "I found where some spikes had been pulled from some bridge ties near the west end of the bridge, and one pair of fish-plates removed from the south raio. There might have been more than that, but I didn't look beyond that."

87 The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 168 A as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to

prove that the answer would be as stated in the deposition in reply to question 168 A, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 169 A as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 169 A, as follows: "Yes, the marks were, where the engine -truck the ties."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 170 A as incompetent, immaterial, and irrelevant; which is sustained; to which defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 170 A, as follows: "Excepting where the spikes were pulled, they were all right."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 171 A as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 171 A, as follows: "There was a mark showing wheel-marks, but the material was in good condition."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 172 A as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 172 A, as follows: "All right—that is, there was nothing to indicate any imperfection in any way."

88 The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 173 A as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 173—, as follows: "Not so far as I found."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 174 A as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 174 A, as follows: "They were clean, indicating that the spikes had been drawn with a bar."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 175 A as incompetent, immaterial, and irrelevant; which is sustained, and which defendant excepts to and offers to prove that the answer would be as stated in the deposition in reply to question 175 A, as follows: "Yes, sir; the tie will indicate that."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 176 A as incompetent, immaterial, irrelevant; which is sustained, and defendant excepts and offer prove that the answer would be as stated in the deposition in repl question 176 A, as follows: (No reply to this question.)

Plaintiff objects to question 177 A as incompetent, immaterial, irrelevant; which is sustained, and defendant excepts and offer prove that the answer would be as stated in the deposition in re to question 177 A, as follows: "It would be simply a clean hole, sh ing the spike had been lifted out."

89 The offer is denied and overruled by the court; to wh the defendant excepts.

Plaintiff objects to question 178 as incompetent, immaterial, irrelevant; which is sustained, and defendant excepts and offer prove that the answer would be in reply to question 178 as stated the deposition, which is as follows: "Ragged; the hole would ragged."

The offer is denied and overruled by the court; to which the fendant excepts.

Plaintiff objects to question 179 as incompetent, immaterial, a irrelevant; which is sustained, and defendant excepts and offers prove that the answer would be as stated in his deposition in sponse to question 179, as follows: "In that case I couldn't, becau I didn't observe the holes themselves close enough. There was t mark of the claw-bar on the top."

The offer is denied and overruled by the court; to which the fendant excepts.

Plaintiff objects to question 180 as incompetent, immaterial, a irrelevant; which is sustained, and defendant excepts an- offers prove that the answer would be as stated in the deposition in rep to question 180, as follows: "Two or three ties I noticed a dent si ilar to the heel of a claw-bar."

The offer is denied and overruled by the court; to which the d fendant excepts.

Plaintiff objects to question 181 as incompetent, immaterial, a irrelevant; which is sustained, and defendant excepts and offers prove that the answer would be as stated in his deposition in repl to question 181, as follows: "The heel of a claw-bar."

The offer is denied and overruled by the court; to which the d fendant excepts.

Plaintiff objects to question 182 as incompetent, immaterial, an irrelevant; which is sustained. and defendant excepts and offers t prove that the answer would be as stated in the depositio

90 in reply to question 182, as follows: "I think it was the firs full rail on the bridge."

The offer is denied and overruled by the court; to which the de fendant excepts.

Plaintiff objects to question 183 as incompetent, immaterial, an irrelevant; which is sustained, and defendant excepts and offers t prove that the answer would be as stated in the deposition in repl to question 183, as follows: "About twelve or fourteen feet, I think."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 184 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 184, as follows: "The rail that was partly on the dump and partly on the ground."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 185 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 185, as follows: "Yes."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 186 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 186, as follows: "No, sir; it was shoved over to the south."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 186½ as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition
91 in reply to question 186½, as follows: "The top of the ties were dented as if struck by a wheel."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 187 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 187, as follows: "Partly, but started toward the north and east."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 188 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 188, as follows: "I don't know; didn't observe that carefully." The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 189 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 189, as follows: "Just looked at it, looked over it, walked alongside of it."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 190 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to

prove that the answer would be as stated in the deposition in reply to question 190, as follows: "The north rails appeared to be in place. Further down there were marks of wheels dropping off the north rail, but some distance after it had dropped off the south rail."

The offer is denied and overruled by the court; to which the defendant excepts.

92 Plaintiff objects to question 191 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 191, as follows: "The rails on the south side had been tampered with by fish-plates being removed and the spikes drawn, leaving it in such a condition that a train moving over it would crowd the rail out of place, and it would become derailed."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 192 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 192, as follows: "Lincoln."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 208 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 208, as follows: "I didn't see the fish-plate. I noticed the absence of it."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 209 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 209, as follows: "No, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 210 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in response to question 210, as follows: "I didn't see any."

The offer is denied and overruled by the court; to which the defendant excepts.

93 Plaintiff objects to question 211 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 211, as follows: "No, sir."

The offer is denied and overruled by the court; to which the defendant excepts. Said deposition was admitted and read in evidence, with the exceptions stated above, and is set out herein, commencing on page 180.

The defendant now offers in evidence the deposition of BERT CAMBRIDGE and each and every question propounded and all the answers

thereto, which are objected to as per objections of plaintiff on file in the records of this court, which are set out as follows: Plaintiff objects to question 212 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition, which is as follows, in reply to question 212: "Nebraska."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 213 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendants offers to prove that the answer would be as stated in the deposition in reply to question 212: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 214 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 214, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to — 215 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers
94 to prove that the answer would be as stated in the deposition in reply to question 215: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 216 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 216, as follows: "Yes, sir; I was with them."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 217 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 217, as follows: "Half past six; right after supper in the evening."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 218 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 218, as follows: "From six until eight o'clock."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 219 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 219, as follows: "Why, we took the hand car and went up swimming by the Rock Island track."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 220 as incompetent, immaterial, and irrelevant, and which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in
95 reply to question 220, as follows: "The section boss went with us."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 221 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 221, as follows: "At Rokeby."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question -22 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 222, as follows: "George Richardson."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 223 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 223, as follows: "My brother, me, and the two Foster boys and another Swede fellow; I don't know his name."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 224 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 224, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 225 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 225, as follows: "Up the Rock Island track to the
96 overhead bridge."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 226 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 226, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 227 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply

to question 227, as follows: "I don't know; just the same as the rest of the track was; run over it; it was all right."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 228 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove *that the answer would be as stated in the deposition* in reply to question 228, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 229 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 229, as follows: "Put the hand car on the track and run back over the bridge."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 230 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 230, as follows: "A little before eight; ten or
97 fifteen minutes, I should judge."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 231 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 231, as follows: "Got on the hand-car and run down to Rokeby."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 232 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 232, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts. Said deposition, with the exception of the questions objected to above and the answers thereto, was read to the jury and is set out herein, commencing on page 188.

The defendant offers in evidence the deposition of Miss LETTIE SIDELL, and offers to read each and every question therein and the answers thereto; to which the plaintiff objects as per his objections on file in this court, which are as follows:

Plaintiff objects to question 237 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 237, as follows: "About five miles south of Lincoln."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 238 as incompetent, immaterial, and

irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 238, as follows: "At the same place."

The offer is denied and overruled by the court; to which the defendant excepts.

98 Plaintiff object- to question 239 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 239, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 240 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 240, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects — 241 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 241, as follows: "Shortly after nine o'clock; somewhere along there."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 242 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 242, as follows: "Yes, sir; my father and brother and another man."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 243 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in her deposition in reply to question 243, as follows: "About ten or fifteen minutes, I guess."

The offer is denied and overruled by the court; to which the defendant excepts.

99 Plaintiff objects to question 244 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 244, as follows: "I went southeast until I came to the bridge across Salt creek, and then I went northeast."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 245 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 245, as follow-: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 246 as incompetent, immaterial, and irrelevant; which is sustained, and defendants excepts and offers to prove that the answer would be as stated in her deposition in reply to question 246, as follows: "Just a few steps."

The offer is overruled and denied by the court; to which the defendant excepts.

Plaintiff objects to question 247 as incompetent, immaterial, and irrelevant; which is sustained, and defendants excepts and offers to prove that the answer would be as stated in her deposition in reply to question 247, as follows: "Yes, I noticed the rail out of place."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 248 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 248, as follows: "Oh, eight or ten inches, I guess."

The offer is denied and oyerruled by the court; to which the defendant excepts.

Plaintiff objects to question 249 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and
100 offers to *to* prove that the answer would be as stated in her deposition in reply to question 249, as follows: "Yes, sir."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 250 as incompetent, immaterial, and irrelevant; and which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in her deposition in reply to question 250, as follows: "Mrs. Cowdon."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 251 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in her deposition in reply to question 251, as follows: "Oh, half an hour or three-quarters."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 252 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 252, as follows: "They took the people to the train, and I went right home."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 253 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 253, as follows: "B. & M., I think."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 254 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in
101 reply to question 254, as follow-: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 255 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 255, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 256 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 256, as follows: "Mrs. Cowdon."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 257 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 257, as follows: "Found three passes."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 258 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 258, as follows: "Mr. Cherry."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 259 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 259, as follows: "I took them home."

The offer is denied by the court; to which the defendant excepts.

102 Plaintiff objects to question 260 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 260, "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 261 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her reply to question 261, "Mr. and Mrs. Southwell and Mrs. Southwell's sister."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 262 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that answer would be as stated in the deposition in reply to question 262, as follows: "Going towards the wreck."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 263 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 263, as follows: "As soon as father came I gave them to him,"

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 264 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 264, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 265 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers
103 to — that the answer would be as stated in reply to question 265, as follows: "At the court-house."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 266 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 266, as follows: "Yes, sir."

The offer is denied by the court; to which the defendant excepts.

Plaintiff objects to question 267 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be — stated in her deposition in answer to question 267, as follows: "He was the mail agent on the train that was wrecked, I think."

The offer was denied by the court; to which defendant excepts.

Said deposition, with the exceptions of the questions objected to above and the answers thereto, was read in evidence and is set out herein, commencing on page 191.

The defendant now offers in evidence the deposition of ALONZO CAMBRIDGE, and offers to read each and every question and the answer thereto; to which the plaintiff interposes objections as per the objections on file in this court, as follows:

Plaintiff objects to question 271 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 271, as follows: "I live in Valparaiso."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 272 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 272, as follows: "I was living at Mrs. W. W. Holmes' place, near Rokeby."

104 The offer is denied by the court; to which the defendant excepts.

Plaintiff objects to question 273 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 273, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 274 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 274, which is as follows: "About two miles."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 275 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 275, as follows: "Yes, sir."

Plaintiff objects to question 276 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 276, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 277 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 277, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 278 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition
105 in reply to question 278, as follows: "A brother."

The offer is denied; to which defendant excepts.

Plaintiff objects to question 279 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 279, as follows: "August, 1894."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 280 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 280, which is as follows: "Up swimming in Lincoln park."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 281 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 281, as follows: "It was seven o'clock when we went up."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 282 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 282, as follows: "About 8.20."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 283 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts. Defendant offers to prove that the answer would be as stated in his deposition in reply to question 283, which is as follows: "We were going up swimming that night and went over to the station at Rokeby and got the boys to go up swimming, with the hand car, and we got the hand car and run to this overhead bridge and put the hand car off and went down to the U. P. railroad and went about a mile
106 north and went swimming and came back and put our car on at the bridge and run out over the bridge to let the train go under, and then left for town again."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 284 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 284, as follows: "Yes, sir."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 285 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 285, as follows: "So far as I know, they were all right. The hand car run over them all right."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 286 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 286, as follows: "No, sir."

The offer is denied and overruled by the court; to which defendant excepts. Said deposition, except the questions objected to above and the answers thereto, was read in evidence and is hereafter set out, commencing on page 194.

The defendant now offers in evidence the deposition of ERNEST TYRER, which is hereinafter set out, commencing on page 196, and offers to read each and every question therein and the answers thereto; to which plaintiff makes objections as contained in the files of this court, which are as follows:

Plaintiff objects to question 287 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 287, as follows: "I am living with Mr. Lonsdale, about six miles south of town."

107 The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 288 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 288, as follows: "I was working with them about seven miles south of town."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 289 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 289, as follows: "Yes, sir."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 290 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 290, as follows: "Why, about three months, I should judge; three or four; something like that."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 291 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 291, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 292 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 292, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 293 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and
108 offers to prove that the answer would be as stated in his deposition in reply to question 293, as follows: "That was the coat."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 294 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 294, as follows: "Why, it was, I think—I don't know exactly. It was one Sunday I saw it first. He came out there."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 295 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply

to question 295, as follows: "It was a blue double-breasted coat and had black buttons on with these patent fasteners—these rings."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 296 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 296, as follows: "They were for the purpose of changing the buttons on the coat."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 297 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 297, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 298 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and
109 offers to prove that the answer would be as stated in the deposition in reply to question 298, as follows: "That Sunday he was out visiting."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 299 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 299, as follows: "Why, just a short time; don't know exactly just how long."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 300 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 300, as follows: "Why, it was too large."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 301 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 301, as follows: "Twice—that is, since he left the farm."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 302 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his answer in reply to question 302, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 303 as incompetent, immaterial, and

irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in
110 reply to question 303, as follows: "I think he started about the fifteenth of March, if I remember right."

The offer is denied by the court. The defendant excepts.

Plaintiff objects to question 304 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 304, as follows: "About three months."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 305 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 305, as follows: "I should judge it was about probably a week, or a little more, before the wreck."

The offer is denied and overruled by the court; to which defendant excepts

Plaintiff objects to question 306 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 306, as follows: "No; not at that time."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 307 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 307, as follows: "The next time I saw him was the night after the wreck."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 308 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in answer to question 308, as follows: "Yes, sir."

The offer is denied by the court; to which defendant excepts.

111. Plaintiff objects to question 309 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 309, as follows: "Why, he told me one Sunday there; we was walking across one of the lots. He said he guessed farming didn't agree with him any more, and he guessed the railroad company would have to do something for him."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 310 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in deposition of witness in reply to question 310, as follows: "About two weeks, I guess, as near as I can remember."

The offer is denied by the court; to which defendant excepts.

All said deposition was excluded, which is set out herein, commencing on page 199.

Defendant offers in evidence the deposition of WALTER SIDELL, and offers to read each and every question therein and the answers thereto; to which the plaintiff objects, as per their objections on file in this court, which are as follows:

Plaintiff objects to question 311 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 311, as follows: "I live five miles southwest of this city."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 312 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 312, as follows: "I lived in the same place I do now."

112 The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 313 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 313, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 314 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 314, as follows: "Lived just about a straight mile northeast of that."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 315 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 315, as follows: "About a half a mile; a little more or less."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 316 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 316, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 317 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 317, as follows: "I got there—claim to be first man—that is, myself and boy and a man by the name of Jack Coulture."

113 The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 318 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 318, as follows: "We heard it."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 319 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 319, as follows: "We had been threshing that day and just got through and was sitting in the dining-room, and we heard a train coming, and somebody made the remark, 'There comes Dumpy.' We used to call it 'Dumpy' because it only had two coaches on, and we heard it very plain. All at once it made a terrible racket, as if it was running on something besides rails, and a kind of a thud, and that is the last we heard of it until steam began to occur, and then we went out on the porch."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintif- objects to question 320 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 320, as follows: "About 9.30, I think."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 321 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to — that the answer would be as stated in his deposition in reply to question 321, as follows: "Why, I looked over in that direction of that bridge, and I could see fire or light under that bridge. I says to the boys, I believe that is a wreck; and somebody says, I guess not; and I says, I am almost sure of it; and we could hear
114 voices also, and I says, Let's go over and see; and my boy says, You hadn't better go, as it might be a 'hold-up;' and I says, I don't care; and we went over there—three of us—and we walked and run and got there just as soon as we could and examined the wreck."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 322 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition, as follows: "Went afoot."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 323 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 323, as follows: "We went southeast a little ways—about half the way—and then northeast until we struck the railroad."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 324 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 324, as follows: "To cross Salt creek."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 325 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 325, as follows: "Yes, sir; we jumped off the very place, you might say, within, I should say, of four or five feet of the rail that was off."

The offer is denied and overruled by the court; to which defendant excepts.

115 Plaintiff objects to question 326 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition, as follows: "I don't remember just exactly whether I did or not in the first place."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 327 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition, as follows: "Well, after we jumped off I saw the wreck, and somebody called to us; they heard us and told us for God's sake to come down; that they were wrecked, and we went down to the rear coach, where some of the passengers were, and Mr. Foot was standing down at the baggage car, and he called us to come and help him get a man that was fastened in the wreck, and we went down there, and he had a lantern, and I says, Is this all the lantern you got? and he says, Yes, and I says to my boy, You go home and get a lantern. I asked him if there was a bucket to put the fire out in the engine; the coals was burning in the grate and I saw no danger, but I thought the fire ought to be put out because something might catch fire; and he says, No, there is no bucket; and I have a way of whistling to my neighbor, and I whistled to a man by the name of Van Brewer, on the top of the hill; so I waited a few minutes, and instead of its being Van Brewer coming it was my brother and Mr. Saxon, and so we began to chop to get this man out, and we worked at that; in fact, we never noticed the fire any more until it started, and we spent all the time getting him out, and the fire wasn't more than eighteen inches from him when we pulled him out, then we put him on the hill where the rest of the passengers were near the rear coach. About that time this B. & M. train came along on the B. & M. tracks and stopped, and they came over and we took the passengers over, those that couldn't walk, and put them on the train. Then we came back and went out to the place where it started to run off."

116 The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 328 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition, as follows: "When I got up there Mr. Saxon and Harry Foot, the brakemen, was there. I think that is all that was there when I got there, and we began to examine the track. Well, we found the spikes pulled on the southeast side of the rail; also seen a few, I think one or two, pulled on the north side and one or two heads pulled off."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 329 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 329, as follows: "This was on the south rail, as I call it, the southeast rail."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 330 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts, and offers to prove that the answer would be as stated in his deposition in reply to question 330, as follows: "That is where the rail was misplaced."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 331 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 331, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which defendant excepts.

117 Plaintiff objects to question 332 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 332, as follows: "Yes, sir."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 333 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 333, as follows: "That is what they showed, and that is what we all agreed."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 334 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated to — question 334, as follows: "I seen the spikes were pulled out, and I seen the angle bars were gone. The rail, I should judge, was between ten and twelve inches, placed over on the outside, and you could see where the flanges of the wheel had struck the ties, and we looked to see whether we could see any marks on the ties of the claw-bar, which we found. Finally, we began to look around for some tool, and I was with the gang, too,

who picked up the bar, but I couldn't exactly tell who it was, but I think it was Mr. Saxton, the young gentleman."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 335 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 355, as follows: "Right off the bank, about fifteen feet from the place where the rail was taken off, right over the bank to the south; and we found this bar and brought it up, and also found some other pieces, and we tried this bar in the same marks and it fit exactly, and the impression of the bar made in the ties—the impression was just as fresh as if done recently, and I seen on
118 the other side, on the north side, of the rail a spike or two pulled, and one or two off the heads pulled out with the heads just as bare as could be."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 336 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 336, as follows: "Yes, sir."

The offer is denied by court; to which defendant excepts.

Plaintiff objects to question 337 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 337, as follows: "I should judge for five or six ties."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 338 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 338, as follows: "Went off towards the left—towards the north."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 339 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 339, as follows: "I think until about the end of the second rail only."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 340 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 340, as follows: "The rails began, it seems to me, — lean over partly,
119 and they pushed them out—shoved them out—and it seemed to run right off the bridge."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 341 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 341, as

follows: "There was a pair of pinchers, this bar, and I don't remember now of anything else, only bolts and washers."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 342 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 342, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 343 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 343, as follows: "In the court-room."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 344 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his reply in the deposition in answer to question 344, as follows: "No, I don't."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 345 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 345, as follows: "I think it was identified by one
120 man."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 346 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 346, as follows: "I think it was Shouse."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 347 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 347, as follows: "I seen a colored man, and only one, but whether it was Davis or not, I don't know myself."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 348 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 348, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 349 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply

to question 349, as follows: "I didn't see him go, but seen him come back on the train."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 350 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in
121 reply to question 350, as follows: "Well, after I got home she handed me some passes, one over the B. & M., one over the Rock Island, and one over the U. P."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 351 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 351, as follows: "They belonged to C. H. Cherry."

The offer is denied by court; to which defendant excepts.

Plaintiff objects to question 352 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 352, as follows: "Brought them up to the hotel—the Fremont, I think it is, at the corner of 9th and P streets, I think it is—and he was out at the time, and I left them there with the nurse that was nursing Scott, the same nurse that was nursing Cherry. No; it was the Opelt hotel."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 353 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 353, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 354 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 354, as follows: "I think Mr. Cherry had them, handed them to the attorneys there, and I had them in my hands."
122 The offer is denied and overruled by court; to which defendant excepts.

Plaintiff objects to question 355 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 355 in the deposition, as follows: "Yes, sir; I found a washer."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 356 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 356, as follows: "Right under the joint, and was misplaced."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 357 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in answer to question 357, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 358 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 358, as follows: "Yes, sir; I did."

Plaintiff objects to question 359 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 359, as follows: "Yes, sir; I found them myself."

The offer is denied and overruled by the court; to which defendant excepts.

123 Plaintiff objects to question 360 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 360, as follows: "They laid right under the main ties, on the timbers."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 361 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 361, as follows: "I don't think it was much over fifteen minutes."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 362 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 362, as follows: "I stayed from the time I arrived there until two o'clock."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 363 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 363, as follows: "Went next morning about eight o'clock."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 364 as incompetent, immaterial, and irrelevant. Sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 364, as follows: "No, sir; I didn't see that."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 365 as incompetent, immate-
124 rial, and irrelevant. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 365, as follows: "No, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 366 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 366, as follows: "Yes, sir; we found spikes and bolts."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 367 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 367, as follows: "Well, the bolt was unscrewed and fresh, as if it was just unscrewed; no rust, only a little at the end, but where the nut seemed to be fastened it was just as bright as could be."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 368 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 368, as follows: "The spikes there—I couldn't say how about the spikes any more than remember whether they looked to be old spikes or just drawn out, but we found spikes just the same right there; examined the spike-holes very closely that night."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 369 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question
125 369, as follows: "Why, the spike-holes seemed to be just the same as a hole naturally would be by a spike being driven in and pulled out."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 370 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in question 370 in said deposition: "No, no dust; just looked as though naturally drawn out." We fitted some spikes in the same holes."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 371 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply

to question 371, as follows: "No, not exactly; she left shortly—right away after we carried the passengers over."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 372 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 372, as follows: "I did."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 373 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 373, as follows: "No, sir."

The offer is denied by court, and defendant excepts.

All of said deposition was excluded.

The defendant now offers in evidence the deposition of WILLIAM WEEMS, which is hereinafter set out, commencing on page 211, and offers to read each and every question thereto and the answers therein; to which the plaintiff makes the objections as set
126 forth in *their* written objection- in the files of this court, as follows:

Plaintiff objects to question 404 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 404, as follows: "City block, Lincoln."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 405 as incompetent, immaterial, and irrelevant. Sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 405, as follows: "In the Webster block."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 406 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 406, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 407 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 407, as follows: "Yes, sir."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 408 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 408, as follows: "With a fellow by the name of Raymond."

The offer is denied by the court; to which the defendant excepts.

Plaintiff objects to question 409 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 409, as follows: "Hack driver."

127 The offer is denied by court; to which defendant excepts.

Plaintiff objects to question 410 as incompetent, immaterial, and irrelevant. Objection is *overruled.* Defendant excepts and offers to prove that the answer would be as stated in his answer in reply to question 410, as follows: "About half past ten or eleven o'clock when we got there."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 411 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 411, as follows: "On a hack."

The offer is denied by court; to which defendant excepts.

Plaintiff objects to question 412 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 412, as follows: "We got home a little after one or about one; somewhere along there."

The offer is denied by court; to which defendant excepts.

Plaintiff objects to question 413 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 413, as follows: "The colored fellow came back with us."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 414 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 414, as follows: "I suppose so."

The offer is denied by court; to which defendant excepts.

Plaintiff objects to question 415 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 415, as follows: "Saw him out there at the wreck."

128 The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 416 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would as stated in his deposition — 416, as follows: "The first time I saw him."

The offer is denied by court; to which defendant excepts.

Plaintiff objects to question 417 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his *reply in his* deposition in reply to question 417, as follows: "Yes."

The offer is denied by court; to which defendant excepts.

Plaintiff objects to question 418 as incompetent, immaterial, and

irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 418, as follows: "Yes, sir."

The offer is denied by court; to which defendant excepts.

Plaintiff objects to question 419 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition, as follows, in answer to question 419: "He was coming along with a lantern, and I got to talking to him while he was walking up to the hack, and I asked him how he was coming in, and he said he was going to walk, and we told him we had a hack there and asked him if he would ride, and he said yes, and got in."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 420 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 420, as follows: "It was out."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 421 as incompetent, imma-
129 terial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 421, as follows: "Well, about the first conversation I had with him was with regard to the lanter-. The first thing I asked him for his lanter- to help us get out of the cornfield there, and we got to talking about the lantern, and then I found out—I think, the first way it started I asked him if that was a railroad lantern, and he said it was, I think, yes, and he was on the train during the wreck; then the wreck happened, and then I told him I didn't think it was a railroad lanter-, and he said, Yes, it was, and then we wanted to know why it didn't break out when the train went off the trestle."

The offer is denied by court; to which defendant excepts.

Plaintiff objects to question 422 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 422, as follows: "He said he was sitting in the seat with the brakeman and held the lantern in his hand some way when the train went off and it didn't break, and that is the first I knew about his being in the wreck; and I asked him where he had been, and he said he had been out to Kearney selling some horses for Maxey Cobb; and I called his attention to the fact that he couldn't come from Kearney on the Rock Island, and first he could, and then he said he walked to some town out there somewhere and got on, and he also said about having $200.00 of Maxey Cobb's money in his coat pocket, and during the wreck he took his coat off and hung it on the steps of the coach and it burned up, money and all."

The offer is denied by the court; to which the defendant excepts.

Plaintiff objects to question 423 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 423, as follows: "I spoke to him about it and said I

didn't think they allowed colored men to ride in it, and he said they did; and I have forgot just what he did say."

130 The offer is denied by court; to which the defendant excepts.

Plaintiff objects to question 424 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 424, as follows: "I don't remember whether he did or not."

The offer is denied by the court; to which the defendant excepts.

Plaintiff objects to question 425 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 425, as follows: "Said his name was Washington Davis. I don't remember whether he told me his name or not that night."

The offer is denied by the court; to which the defendant excepts.

Plaintiff objects to question 426 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 426, as follows: "Came here to L street—L and 11th."

The offer is denied by the court; to which the defendant excepts.

Plaintiff objects to question 427 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 427, as follows: "No; I think not; he knew where he was going. We stopped there and watered the horses and he got out."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 428 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 428, as follows: "The next time in the court-house."

The offer is denied by the court; to which the defendant excepts.

Plaintiff objects to question 429 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 429, as follows: "Yes, sir."

The offer is denied by the court; to which defendant excepts.

131 Plaintiff objects to question 430 as incompetent, immaterial, and irrelevant. Objection overruled. Defendant excepts and offers to prove that the reply would be as stated in his deposition in response to question 430, as follows: "Why, he gave the hackman one dollar."

The offer is denied by the court; to which the defendant excepts.

Plaintiff objects to question 431 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 431, as follows: "No; I think not."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 432 as incompetent, immaterial. Ob-

jection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 432, as follows: "Had kind of a swinging walk; leaned forward considerably when he walked."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 433 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 433, as follows: "Had on dark-blue pants and vest."

The offer is denied by the court; to which the defendant excepts.

Plaintiff objects to question 434 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 434, as follows: "Kind of a light shirt; kind of a pale blue."

The offer is denied by the court. Defendant excepts.

All of said deposition was excluded.

Defendant offers in evidence the deposition of WILLIAM LONSDALE, which is hereinafter set out, commencing on page 215, and offers to read each and every question thereto and the answers therein; to which the plaintiff objects, as per his written ob-
132 jections on file in this court, set out as follows:

Plaintiff objects to question 435 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 435, as follows: "Why, I live south of the penctentiary now. I used to live on the Marquette farm."

The offer is denied by the court; to which defendant excepts.

Plaintiff objects to question 436 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 436: "Five miles south on 27th street, on the Marquette farm."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 437 as incompetent, immaterial, and irrelevant. Objections sustained. Defendant excepts and offers to prove the answer would be as stated in reply to question 437: "I was."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 438 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 438, as follows: "Ah, about two or three months, I guess; two months, I guess."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 439 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply

to question 439, as follows: "Why, he had been there—let me see. I think it was the Sunday before the wreck; am not sure, but think it was."

The offer is denied and overruled by the court; to which defendant excepts.

133 Plaintiff objects to question 440 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 440, as follows: "He had a blue suit on."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 441 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 441: "New."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 442 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 442, as follows: "I didn't see anything."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 443 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 443, as follows: "Had on dark buttons, and fastened with rings on the inside."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 444 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 444, as follows: "Yes, sir; he had a pipe and a picture in the coat pocket."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 445 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and

134 offers to prove that the answer would be as stated in his deposition in reply to question 445, as follows: "Yes, sir; he had a looking class, a round looking class."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 446 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 446, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 447 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 447, as follows: "In the court-room."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 448 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 448, as follows: "From the pocket of his coat."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 449 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 449, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 450 as incompetent, immaterial,
135 and irrelevant. Objection sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 450, as follows: "Yes, sir."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 451 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in the reply in his deposition to question 451, as follows: "A young man that worked for us by the name of Ernest Tyrer."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 452 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 452, as follows: "Too large for him."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 453 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply in his deposition to question 453, as follows:

"He *said* brass buttons put on and he would take them off; that he was expecting to use them after a bit."

The offer is denied and overruled by the court. The defendant excepts.

Plaintiff objects to question 454 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 454, as follows: "Why, he didn't say."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 455 as incompetent, immaterial,
136 and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 455, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 456 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 456, as follows: "He worked for about two months, I guess."

The offer is denied and overruled by the court. Defendant excepts.

Plaintiff objects to question 457 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 457, as follows: "Why, as if lame, as if his feet were sore; sort of shambling walk; didn't walk as if he was al- right."

The offer is denied and refused by the court. The defendant excepts.

All of said deposition was excluded.

Defendant offers in evidence the deposition of FRED LONSDALE (which is hereinafter set out, commencing on page 218) and offers to read each and every question therein and the answer thereof; to which the plaintiff objects as per his written objections on file in this court, as follows:

Plaintiff objects to question 458 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 458, as follows: "Six miles south."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 459 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 459, as follows: "Farming."

137 The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 460 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be stated in his deposition in reply to question 460, as follows: "Six miles south, on the farm known as the Marquette farm."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 461 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to

prove that the answer would be as stated in his deposition in reply to question 461, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 462 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 462, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 463 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 463, as follows: "Yes, sir."

The offer is denied and refused by the court. The defendant excepts.

Plaintiff objects to question 464 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 464, as follows: "Yes, sir."

The offer is denied and refused by the court. The defendant excepts.

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Plaintiff objects to question 464 as incompetent, immaterial, and irrelevant. Objection sustained Defendant excepts and offers to prove that the answer would be as stated in his deposition
138 in reply to question 464, as follows: "Yes, sir."

The offer is denied and refused by court. The defendant excepts.

Plaintiff objects to question 465 as incompetent, immaterial, and irrelevant. Objections sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 465, as follows: "Sunday evening before the wreck."

The offer is denied and overruled by the court. The defendant excepts.

Plaintiff objects to question 466 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 466, as follows: "No, sir."

The offer is denied and refused by the court. The defendant excepts.

Plaintiff objects to question 467 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 467, as follows: "Either Wednesday or Thursday before."

The offer is denied and refused by the court. The defendant excepts to the same.

Plaintiff objects to question 468 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply

to question 468, as follows: "I made the remark to him about his being so well dressed and everything when he was out of work, and he came around close to where I was sitting and took hold of it and felt of it, and made a remark; that I turned the coat over and there was rings on the buttons, and I asked the reason of that, and he said it was to put brass buttons on when he got a job on the train."

The offer is denied and overruled by the court; to which defendant excepts.

139 Plaintiff objects to question 469 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 469, as follows: "William Lonsdale, Ernest Tyrer, and I believe Jess Enslow."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 470 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in response to question 470, as follows: "He was there, too."

The offer is refused and overruled by the court; to which defendant excepts.

Plaintiff objects to question 471 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 471, as follows: "The next evening."

The court denies and overruled the offer; to which the defendant excepts.

Plaintiff objects to questions 742 as incompetent, immaterial, and irrelevant. Objections sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 472, as follows: "I think about seven o'clock."

The offer is denied and overruled by the court; to which the defendant excepts.

Plaintiff objects to question 473 as incompetent, immaterial, and irrelevant. Objections is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 473, as follows: "At our place, the Marquette farm."

The offer is denied and overruled by the court; to which defendant excepts.

Plaintiff objects to question 474 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and

140 offers to prove that the answer would be as stated in his deposition in reply to question 474, as follows: "Why, I knew he was coming before he got there, and I was out to the blacksmith shed; we have a gait- there to go into the barn yard, and he came up to me and we passed the time of day and I said it was hot, and he said it wasn't as hot as it was down at the wreck last night, or something like that."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 475 as incompetent, immaterial, and

irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 475, as follows: "Then he spoke. I asked him, Was you at the wreck? or something like that, and he said yes. He said he had got on the train at Rokeby and was sitting in the hind seat with Harry Foot; don't know whether he said Harry Foot or not, but the brakeman, and he threw his head out of the window and seen the engineer and fireman throw the-re arms around each other and went *other* over."

The offer is denied and refused by the court; to which the defendant excepts.

Plaintiff objects to question 476 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 476, as follows: "We walked on across the corral, and Mr. Enslow just came then with his wagon and we commenced talking about the wreck, and he said that the bolts had been taken ofsome way and a part unscrewed under the rail, and he took his hand and showed like this (indicating), and showed how a bar was put under the rail and pryed over, and then he went from there up to the porch of the house and sat there, and sat there talking about the wreck. He talked about the engineers getting too dammed smart and wouldn't stop; that they were afraid of a hold-up."

The offer is denied and refused by the court; to which defendant excepts.

141 Plaintiff objects to question 477 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 477, as follows: "No, sir."

The offer is denied by court; to which defendant excepts.

Plaintiff objects to question 479 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 479, as follows: "I don't remember anything about the lantern now."

The offer is denied by court. Defendant excepts.

Plaintiff objects to question 480 as incompetent, immaterial, and irrelevant. Sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 480, as follows: "I heard him tell Jim Malone that he was in Colored Club room or on the steps of the Colored Club room and heard the crash and went out."

The offer is denied by court. The defendant excepts.

Plaintiff objects to question 481 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 481, as follows: "My brother, William Lonsdale, and Ernest Tyrer had drove about forty rods from the house and they seen him coming, and they drove back and told me he was coming."

The offer is denied by court. The defendant excepts.

Plaintiff objects to question 482 as incompetent, immaterial, and

irrelevant. The objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 482, as follows: "Two o'clock in the morning; the same evening of the wreck."

The offer is denied by court. Defendant excepts.

142 Plaintiff objects to question 483 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 483, as follows: "Saxton."

The offer is denied by court. Defendant excepts.

Plaintiff objects to question 483 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 483, as follows: "Yes, sir; his son."

The offer is denied by court. Defendant excepts.

Plaintiff objects to question 485 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 485, as follows: "Sort of rolled when he walked."

The offer is denied by court. Defendant excepts.

Plaintiff objects to question 486 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 486, as follows: "He had blue pants and a blue vest and some kind of a colored shirt on, and, I believe, a brown soft hat."

The offer is denied by court. Defendant excepts. All of said deposition was excluded.

The defendant now offers in evidence the deposition of O. B. RAMET, which is hereinafter set out, commencing on page 222, and offers to read each and every question therein, with the answers thereto; to which the plaintiff objects as per his written objections on file in this court, as follows:

Plaintiff objects to question 487 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 487, as follows: "Agent for the Pacific and United

143 States Express Co."

The offer is denied by court; to which defendant excepts.

Plaintiff objects to question 488 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 488, as follows: "Same."

The offer is denied by court, and defendant excepts.

Plaintiff objects to question 489 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 489, as follows: "City — Lincoln, Nebraska."

The offer is denied by court, and defendant excepts.

Plaintiff objects to question 490 as incompetent, immaterial, and

irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 490, as follows: "I did."

The offer is denied by court, and the defendant excepts.

Plaintiff objects to question 491 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 491, as follows: "Yes; Mr. W. G. Roberts and Dr. Crim."

The offer is denied by court. Defendant excepts.

Plaintiff objects to question 492 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 492, as follows: "Yes, sir; we went out on the top of the bridge with that intention."

The offer is denied by court, and defendant excepts.

Plaintiff objects to question 493 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts
144 and offers to prove that the answer would be as stated in his deposition in reply to question 493, as follows: "Well, at the south end of the bridge as if coming on to the trestle-work the south rail showed that it had been removed, and that the wheels of the locomotive run squarely off the end of the rail, striking the ties in a direct line from the end of the rail, showing that the rail must have been moved from there when the wheels reached that point."

The offer is denied by court. Defendant excepts.

Plaintiff objects to question 494 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 494, as follows: "The south rail coming onto the bridge from the southwest, the track running towards the northeast, it would be the south rail, or the one on your right."

The offer is denied by court. Defendant excepts.

Plaintiff objects to question 495 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 495, as follows: "To the fourth tie."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 496 as incompetent, immaterial, and irrelevant. Objection is sustained. The defendant excepts and offers to prove that the answer would be the same as contained in his deposition in reply to question 496, as follows: "They had been drawn. The imprints of a claw-bar was right behind the hole in the tie where the spikes had been drawn straight out of the ties; not bent over by force or anything of that kind."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 497 as incompetent, immaterial, and

irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated
145 in the deposition in reply to question 497, as follows: "We particularly noticed that they were fresh."

The offer is denied and refused by court; to which defendant excepts.

Plaintiff objects to question 498 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 498, as follows: "No; the spikes had been scattered around there. There were none of the spikes around there, I think, on the south side at the time we were there."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 499 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 499, as follows: "No; there was none there, but some on the trestle works, but none at the place where the rails had been disconnected."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 500 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 500, as follows: "Yes, sir."

The offer is denied and refused by the court. Defendant excepts.

Plaintiff objects to question 501 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to proves that the answer would be as stated in the deposition in reply to question 501, as follows: "Yes, sir."

The offer is denied and refused by the court. Defendant excepts.

146 Plaintiff objects to question 502 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 502, as follows: "Commencing, I think, on the sixth tie, there was a spike pulled and on the seventh. On the eight- tie there was a spike remaining in the tie, but it had been stripped. It was still fresh. The claw-bar had scraped off the head of it, but had not removed the spike. It still remained there."

The offer is denied and refused by the court. Defendant excepts.

Plaintiff objects to question 503 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 503, as follows: "They were drawn out on the south side until you got up pretty close to the end of the rail and then they were tipped over."

The offer is denied and refused by the court. The defendant excepts.

Plaintiff objects to question 504 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 504, as follows: "This was the north rail I was speaking of."

The offer is refused and denied by the court. The defendant excepts.

Plaintiff objects to question 505 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 505, as follows: "Well, those spikes were gone down close to the end of the rail, but there was a bolt coming from the 6th tie, fastening the tie to the frame of the bridge, where they flange of the engine had hit squarely on top, sinking the top into the wood and just leaving a mark, and past on to the next tie and struck that with full force on the next tie, making a mark from the rail right straight forward where the rail should be left."

The offer is denied and refused by the court. The defendant excepts.

147 Plaintiff objects to question 506 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant offers to prove that the answer would be as stated in the deposition in reply to the question 506, as follows: "They were."

The offer is denied and refused by the court. Defendant excepts.

Plaintiff objects to question 507 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in reply to question 507, as follows: "Yes, sir; and I said the spikes were removed, commencing at the 6th tie on the north side of the rail, then coming up to the 8th tie, the spike still remained in it, showing it had been clinched with a claw-bar just stripped at the side of the head."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 508 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 508, as follows: "It was still in place, but hardly in line; it had been pressed out, the spikes being removed from the north side."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 509 as incompetent, immaterial, and irrelevant. The objection is sustained, and the defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 509, as follows: "At the north end of the rail."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 510 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in reply to question 510, as follows: "About 28 feet, I guess."

148 The offer is refused and denied by the court. Defendant excepts.

Plaintiff objects to question 511 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 511, as follows: "You mean in regard to the south or north side?"

The offer is denied and refused by the court; to which the defendant excepts.

Plaintiff objects to question 512 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 512, as follows: "On the south side the wheel came in contact with the misplaced rail and crowded hard against it until it pushed it over, and the wheel passed over the corner of that rail right at the joint with it and the rail further north, and they were in sort of a 'V' shape where it crossed over the end, and from that point the marks bore off towards the north. It seemed to have changed the course of the engine by running off the ends of these rails."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 513 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 513, as follows: "The 8th tie."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 514 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answers would be as stated in — question 514, as follows: "Yes, sir; I did."

The offer is denied and refused by the court. Defendant excepts.

Plaintiff objects to question 515 as incompetent, immaterial, and irrelevant. The objection sustained, and defendant offers

149 to prove that the answer would be as stated in defendant's deposition in reply to question 515, as follows: "At the cor-ner's inquest."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 516 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 516, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 577 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 577, as follows: "Yes, sir."

The offer is denied by court. Defendant excepts.

Plaintiff objects to question 578 as incompetent, immaterial, and

irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 578, as follows: "A. The indentation was heavier; was heavier or deeper from an engine wheel than it was from a car wheel."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 579 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 579, as follows: "There would not, and it would be in a direct line if she had given away."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 580 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition, which is as follows, in answer to question 580: "They would if they
150 had been crowded off so as to leave the line. They would go off that way together."

The offer is refused and denied by the court. Defendant excepts.

Plaintiff objects to question 591 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 581, as follows: "Yes, sir."

The offer is denied and refused by court; to which defendant excepts.

Plaintiff objects to question 600 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 600, as follows: "A. Yes, sir."

The offer is denied and refused by court; to which defendant excepts.

Plaintiff objects to question 601 as incompetent, immaterial, and irrelevant. The objection is overruled; to which defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 601, as follows: "Yes, sir."

The offer is refused and denied by court; to which defendant excepts.

Plaintiff objects to question 602 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 602, as follows: "No; I didn't make the written statement to the company. I made the memorandum; took a pencil and make a little diagram of this—the condition I found on the ties and the way the rails were misplaced, and made a memorandum as to which tie the rail was removed from, etc., and that is what I made my evidence from."

The offer is denied and refused by the court; to which the defendant excepts.

Plaintiff objects to question 603 as incompetent, immaterial, and

irrelevant. The objection is sustained, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 603, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

151 Plaintiff objects to question 604 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 604, as follows: "No, sir."

The offer is denied by court; to which defendant excepts.

Plaintiff objects to question 606 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 606, as follows: "Agent for the Pacific and United States Express Company."

The offer is denied by court. Defendant excepts.

Plaintiff objects to question 607 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 607, as follows: "No, sir; never."

The offer is denied and refused by court. The defendant excepts.

All of said deposition was excluded.

The defendant offers in evidence the deposition of Mrs. NETTIE COLLIER, which is hereinafter set out, commencing on page 240, and offers to read each and every question therein and the answers thereto; to which the plaintiff objects as per his objections on file in this court, as follows:

To question 613 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 613, as follows: "Lincoln, Nebraska."

The offer is denied by court. The defendant excepts.

Plaintiff objects to question 614 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 614, as follows: "In Lincoln."

The offer is by denied court. Defendant excepts.

Plaintiff objects to question 616 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and

152 offers to prove that the answer would be as stated in the deposition in reply to question 615, as follows: "In the Rock Island wreck—the Rock Island train, I believe.

The offer is denied by court. The defendant excepts.

Plaintiff objects to question 616 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 616, as follows: "I most assuredly was."

The offer is denied by court. Defendant excepts.

Plaintiff objects to question 617 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to

prove that the answer would be as stated in her deposition in answer to question 617, as follows: "I couldn't say as to that; I wasn't very long."

The offer is denied by court. Defendant excepts.

Plaintiff objects to question 618 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 618, as follows: "A few minutes, I should judge."

The offer is denied by court. Defendant excepts.

Plaintiff objects to question 619 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in answer to question 619, as follows: "Well, I seen a good many, but couldn't call their names there at the time. I remember the Seidells."

Offer denied by court. Defendant excepts.

Plaintiff objects to question 620 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 620, as follows: "My sister-in-law."

Offer is denied by court, and defendant excepts.

153 Plaintiff objects to question 621 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 621, as follows: "Seen just one."

Offer is denied by court. Defendant excepts.

Plaintiff objects to question 622 as incompetent, immaterial, and irrelevant; which objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 622, as follows: "Well, it was a few minutes after I was taken out that I seen him on the hill."

Offer denied by court. Defendant excepts.

Plaintiff objects to question 624 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 624, as follows: "I couldn't say just how long."

Offer denied by court. Defendant excepts.

Plaintiff objects to question 625 as incompetent, immaterial, and irrelevant; which objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 625, as follows: "Well, there was so many got out of the car, and I was pretty excited. I should judge I seen him about as quick as I seen any of them."

Offer is denied by court. Defendant excepts.

Plaintiff objects to question 626 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 626, as follows: "The first time I seen him was when my sister-in-law had her hands on his shoulder and requested him to go down and help the sufferers, and what made me notice it was she had her hands on his shoulder, and then she asked him to go

down and help the sufferers, and that — when I seen the colored man."

Offer denied by court, and defendant excepts.

Plaintiff objects to question 627 as incompetent, immaterial, and irrelevant. Objection is overruled. Defendant excepts and
154 offers to prove that the answer would be as stated in her deposition in reply to question 627, as follows: "She asked him to go down, for God's sake, and help those suffering."

Offer denied by court. Defendant excepts.

Plaintiff objects to question 628 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 628, as follows: "Gave a peculiar yell and went down to the train."

The offer is denied by court. Defendant excepts.

Plaintiff objects to question 629 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 629, as follows: "Mrs. Rutherford."

Offer denied by court. Defendant excepts.

Plaintiff objects to question 630 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in her deposition in reply to question 630, as follows: "Yes, sir."

Offer denied by court. Defendant excepts.

Plaintiff objects to question 631 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 631, as follows: "Col. Bills was one, and there were others, but I don't remember their names."

Offer denied by court. Defendant excepts.

Plaintiff objects to question 632 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 632, as follows: "Yes, sir; Mr. Foos."

155 Offer denied by court. Defendant excepts.

All of said deposition was excluded.

It is admitted that the witnesses whose depositions are offered in evidence do not reside in Thayer county, and that they are not now in Thayer county at this time.

GEORGE J. BISHOP is called as a witness in behalf of the defendant; on being sworn and questioned by Mr. Evans, testified as follows:

Q. Where do you reside, Mr. Bishop?
A. Topeka, Kansas.
Q. What is your business?
A. Superintendent of bridges and buildings.
Q. For what company?
A. The C., R. I. & P. Railroad Company.
Q. How long have you been engaged in railroad work?

A. About eighteen years.

Q. During that time what experience have you had in maintaining and constructing railroad bridges?

A. I have constructed all manner of bridges.

Q. Do you know the kind and character of bridges that are maintained on roads in the United States?

A. Yes, sir.

Q. Do you know the kind of material used in bridges?

A. Yes, sir.

Q. Do you know this bridge where this accident occurred in this case?

A. Yes, sir.

Q. How long have you known that bridge?

A. Since December, 1892.

Q. Did you ever examine that bridge?

A. Not until after the accident.

Q. Did you after the accident?

156 A. Yes, sir; about three days after the accident.

Q. Do you know the kind of material and the character of the material used in the construction of that bridge?

To which the plaintiff objects as incompetent, immaterial, and irrelevant. The objection is sustained; to which the defendant excepts.

Q. I believe you stated that you examined that bridge after the accident in question?

A. Yes, sir.

Q. And while the wreck was there—still there—or a portion of it?

A. It was after the bridge was rebuilt. The bridge had burned out, and I did not examine it until after it was rebuilt and trains passing over it.

Q. The bridge you refer to was a temporary bridge to let trains pass over, was it?

A. Yes, sir.

Q. The work that had been done there after the wreck and before you examined it was temporary work to let trains go over?

A. Yes, sir.

Q. State the condition you found that bridge in; state fully.

To which plaintiff objects as incompetent, immaterial, and irrelevant. The plaintiff objects to any testimony as to the nature and condition of the bridge in question at the time of the wreck. The objections are sustained, and the defendants excepts to the ruling of the court and offers to prove by the witness Bishop that about eight o'clock in the morning of August 10, 1894, this witness was at the place where the train in question was derailed and wrecked at the time in question, and that he made a thorough and complete examination of the railroad bridge trestle-work at the place where said wreck occurred, including the bridge and

157 trestle-work at the place of said wreck, and on either side thereof, as well as the ties and rails, bridge timbers, angle

bars, spikes, nuts, bolts, and everything connected with or constituting a part of the railroad trestle and bridge and track; that he found at the west end of the trestle-work the south rail of the track had been removed from its usual and proper place south four or five inches; that the west end of said rail had been unfastened and disconnected from the rail immediately west therefrom by the nuts, bolts, and angle bars connecting and holding said rails together being removed; that the bolts passing through the angle bars and rails had been taken out; that the nuts on said bolts had been unscrewed and removed in the proper way *way* from said bolts, and that the threads on said bolts were in perfect condition and order; that if said bolts and nuts had been removed or forced from their proper position by the running or operation of the train the bolts would have been broken or the threads thereon stripped; that none of the threads on the bolts were stripped, and that none of the bolts were broken or out of condition in any way; that immediately east of the last rail in place on the west end of said bridge, and on the south side thereof, and in the place where the rail which had been removed had been located before it was moved, and on the top of the ties the witness saw marks and indentations extending eastwardly in a direct line with the flange side of the rail which had remained in place west therefrom, and that said indentations were at the proper *guage* to be made by the south wheels of the engine and train when the north wheels of the train and engine were on the north rail and in their proper position.

That the witness at the time stated above carefully examined the spike-holes along the line where the rail mentioned above as having been removed had been removed from its place as well as the spikes on all of the parts of said bridge and train and at the place of said wreck and for several feet west and east therefrom; that he observed that 15 to 20 spikes holding the rails at the west end of said bridge and where the wreck occurred had been removed and pulled from
158 the ties; that he saw marks and indentations of a claw-bar on the ties at the side of the holes from which the spikes had been pulled, as stated above; that the holes were straight, smooth, and clear from dust and tear and showed plainly the spikes had been pulled therefrom by some person or persons with a claw-bar, the usual appliance for pulling spikes, within a few hours prior to the time of the examination; that the witness in said examination saw on the stringer on said bridge under the said removed rail marks of the claw-bar where it had been placed when the rail mentioned above as being out of place had been forced from its proper position after the removal of the spikes and angle bars; that the angle bars were pieces of iron about 20 inches long and about two and a half inches wide and about half an inch thick that are used in holding together the ends of rails forming a track; "that the angle bars are placed on the sides of the rails and at the ends thereof where the ends of the rails come together and are held in their place by bolts of the kind mentioned above being placed through the angle bars and rails and fastened in that position with nuts;" that the nuts on these bolts cannot be removed without breaking them, unless they

are removed by a person and then by unscrewing the nuts; that if they are removed in any other way the nuts will be broken or the threads thereon stripped; that in the opinion of the witness the rail mentioned above as having been misplaced — by some person or persons before the train or engine reached that part of the track, and that the said rail could not have been misplaced as stated above without the angle bars, nuts, and bolts thereon being removed; that this witness assisted in and had control of the construction and maintenance of the railroad track, bridge, and trestle work at all places and at all times in question; that on the afternoon of the second day immediately before said wreck the witness, in the discharge of his duty as an employé of the defendant, carefully
159 examined and inspected the railroad track, bridge, and trestle and all appliances thereto and the timbers thereof, including the ties, rails, spikes, nuts, bolts, and angle bars and every other part and parcel thereof.

That the said ties were of oak and were in first-class condition in every respect and sound in every way; that the bridge timbers and all materials thereon were in the best condition and of the best quality and were sound and perfect in every way; that the rails on said bridge were of the best character and were sound in every way and were of the best quality and kind that has ever been used in the construction and maintenance of railroads; that said railroad at the place of the wreck and at all other places was at the time of the wreck in the best condition and was sound in every way, and that said railroad and bridge at all places were in the best possible condition and at all times in question.

And the rails and ties and all other appliances used therein — maintained thereon during all the times in question were of the best, safest, and strongest used in the construction or maintenance of railroads or bridges, and that stronger or better ones could not have been obtained at any time; that there was not at the time of said wreck or derailment a rotten or defective tie, stringer, pile, or bridge timber or appliance of any kind in or used upon or about or connected with said railroad or bridge; that said bridge and track at the time of the wreck and the place thereof and for a half a mile on either side thereof was straight on a tangent and was in perfect alignment and surface and in the best condition.

That if the rail referred to above had not been removed by some person or persons before the train reached it the said rail would have remained in its proper position and safely carried the train over it running at the greatest rate of speed possible, even though the spikes, angle bars, and bolts had been removed therefrom;
160 that the witness the day following the wreck took the claw-bar that had been found near by the wreck and within a few minutes thereafter and placed the same on the marks or indentations made on the ties, as stated above, and that the said claw-bar fitted same marks and indentations were of the same size as the heel of said claw-bar; that the witness on the day following the wreck took the monkey-wrench which had been found a few feet from the place of the wreck a short time after the wreck and placed the same on

the nuts that were found immediately above the place of the wreck, and that said wrench was adjusted so as to fit the said nuts and each of them, and that the said wrench had not been changed in any way from the way it had been found soon after the wreck to the time this witness placed the same on the nuts, as stated above.

That the train in question at the time in question was thrown from the track and bridge and derailed by reason of the rail having been displaced at the west end of said bridge and on the south side of said bridge. The plaintiff objects to this testimony as incompetent, immaterial, and the objection is sustained; whereupon the defendant excepts to the ruling of the court. The counsel for the defendant offers to prove by the witness the facts as stated in the second and third paragraphs of its answer filed herein and each of them to which the plaintiff objects as incompetent, immaterial, and irrelevant and indefinite. The objection is sustained and the defendant excepts.

Thereupon the defendant called as witnesses C. J. Bills, T. L. Park, C. H. Cherry, R. W. Day, A. B. Schrantz, Andy Linquist, J. J. H. McKinstry, Mrs. John Ruchlin, Dan'l Sellman, P. White.
161 A. J. Hart, James O'Shea, M. Ryan, J. C. Langtry, J. H. Hoppe, George Saxon, William Saxon, Walter Seidell, Fred Foster, Fred Lonsdale, D. B. Burley, D. H. Monkhouse, Ira Shortribs.

Defendant offers to prove by these witnesses just called the facts stated in the second and third paragraphs of their answer, except that portion of third paragraph of said answer beginning with the following words: "As to whether said plaintiff was on the 10th day of November, 1894, or at any other time the duly appointed and qualified *as* administratrix of the estate of Ernest H. Zernecke, the deceased, the defendant has not knowledge or information thereof sufficient to form a belief.

(COURT:) There is not included in this offer any evidence designed to show that plaintiff, decedent, or Ernest H. Zernecke was not injured and killed in the wreck on defendants' railway about August 9, 1894, nor is there included in this offer any evidence tending to show Ernest H. Zernecke was not in the train."

The plaintiff objects to this offer of defendants as incompetent, immaterial, and irrelevant, and because the offer is not upon the issues in this case. The objection is sustained by the court,
162 and the defendants duly excepts to said ruling.

Thereupon the defendant called as a witness C. H. CHERRY, and offered to prove by the said witness that on the night of the 9th of August, 1894, the witness was on the train at the time it was derailed as U. S. mail clerk, and was riding in a postal car of said train; that he had in his possession and in the pockets of his clothes three passes, one issued by the defendant, one by the Union Pacific Railway Company, and one by the B. & M. Railway Company, and from twenty to fifty dollars in paper money; that said passes and all of said money were in his clothes while he was in the train at the time said train was thrown from the track and wrecked; that the witness

did not deliver said passes or either of them or any of said money to any person.

That the witness was fastened in his car by said wreck and was prostrated thereby, and was afterwards taken from said wreck by other persons, who cut their way into said car or to the said witness with axes and saws; that these passes and money were in the witness's pocket at the time of the derailment and were next seen by him when delivered *him* to him in the city of Lincoln — Walter Seidell, the father of Lettie Seidell, a witness in this case; that the witness Cherry did not go and was not upon the defendant's railroad at any point for several weeks thereafter; that this witness has for eight or ten years last past been a mail clerk traveling continuously during said years on many of the leading railroads of the U. S., and is well acquainted with the speed at which the trains on most of the leading railroads are run, and is well qualified and competent to estimate the speed of trains, and knows the speed at which the trains at all times in question was run.

That the train at the time of the accident and for twenty minutes prior thereto was running not to exceed forty miles an hour, and that nothing unusual or uncommon occurred in the running or operation of said train until it reached the point from which the rail mentioned by the witness Bishop had been removed, and that it is usual and customary, and had been for six or eight years im-
163 mediately prior thereto, for passengers and mail trains to run on all the leading railroads of the U. S. from forty to sixty miles per hour between stations; that the first station west was about three miles from the wreck and the first east about 4½ miles, and that the passes and money referred to above were stolen from the pockets of said witness while he was in said wreck by some person or persons unknown to the witness.

The plaintiff objects to this evidence for the reason that the same is incompetent, irrelevant, and immaterial. The objection is by the court sustained; to which the defendant excepts at the time.

Whereupon the defendant called as a witness Miss LETTIE SEIDELL and offers to prove by the said witness just called that on the night of the 9th of August, 1894, at a point about three-fourths of a mile west from the place where the wreck occurred and about two hours after the wreck occurred she found three railroad passes issued by C., R. I. & P. Railway Company, the B. & M. Railroad Company, and the U. P. Railroad Company to C. H. Cherry, being the same passes referred to by the offer in evidence of witness Cherry and Walter Seidell, and that she gave said passes to Walter Siedell.

That she went to the place of the wreck in question within fifteen minutes after the wreck occurred and saw plainly that the rail on the west end of the bridge and on the south side had been misplaced before the train reached it; that she saw and examined the nuts and bolts found at the wreck, and that they were in first-class condition and in perfect order; that the threads of the nuts and bolts were in good condition and were not stripped to any extent, and that they were found at the west end of the bridge within a few

minutes after the wreck occurred; that she saw and examined the bridge timbers, ties, rails, and all other appliances and appurtenances connected with the railroad and bridge, and that they were all solid, sound, and in good condition; that there was no tie or timber or appliance that was defective, rotten, or out of repair
164 in any way, and that the ties and bridge timber were of oak and were strong and substantial in every way; that she saw the marks on the ties showing that the spikes had been removed or pulled therefrom by some person with the use of a claw-bar or some other hard instrument; that she saw a colored man by the name of George Washington Davis at the wreck when she first arrived there, and that he afterwards, and before she found the passes as stated above, star-ed west on the defendant's track in the direction of the place where she afterwards found said passes.

The plaintiff objects to such evidence as incompetent, immaterial, and irrelevant and not within the issues. The objection is sustained; to which ruling the defendants duly except.

Whereupon the defendants called as a witness J. H. McKINSTRY, and offer to prove by this witness that at the time of the wreck in question he was section foreman for the defendant of the section on which the wreck in question occurred, and that it was his duty to look after and maintain the railroad track at all places in question, and that he had control and charge of said work on said section, including the place — the wreck, at the time of and for several months prior thereto, and on every day during said time he inspected and examined the railroad at the place of the wreck and for a long distance on either side thereof, as it was his duty to do.

That on the evening of the wreck in question and at about five forty to six o'clock p. m. he personally and carefully examined and inspected the railroad at all points in question and at the place of said wreck; that he went to those points at the time last above stated in the discharge of his duty; that said railroad and track, bridge, and trestle-work and every part of them and each of them were on the evening of said wreck and immediately prior to said wreck in first-class condition and perfect order; that the ties, rails, bridge timbers, angle bars, fish-plates, nuts, bolts, and rails, and each of them and everything connected therewith were constructed
165 in the best manner and of the best material and were of the best quality and character in use in the U. S.; that the alignment of said bridge and track at all places was perfect; that there was not at any of said times a rotten or defective tie, bridge timber or tie, or other timber, rail, angle bar, fish-plates, nut, or bolt, or other appliance connected with or used on said railroad at the place in question.

And that said railroad and bridge and each of them were constructed and maintained in the best possible manner and condition, so as to insure and protect to the greatest extent the safety of passengers and persons passing over said railroad and of freight and the U. S. mails being transported thereon.

That the witness, on the night of the wreck and within two hours

thereafter, went to the place of said wreck and examined the scene, as well as the track, railroad, bridge, and trestle and all the appliances and the work at the place of the wreck and for a long distance on either side thereof; that at said time he examined the ties, bridge timbers, stringers, angle bars, fish-plates, nuts, bolts, and everything around the said railroad at the place of said wreck and for a long distance on either side of the wreck, and that there was not at said time nor at any other time a rotten or defective tie, bridge timber, stringer, rail, angle bar, spike bar, fish-plate, bolt, nut, or other appliances or fixtures on or connected with the said railroad; that in the examination of said premises above the witness saw that the rail at the west end of said bridge and on the south side—that it had been misplaced by some person or persons; that the fish-plates and angle bars, nuts, and bolts had been removed therefrom by some person before the said wreck occurred; that the nuts, bolts, and angle bars were found at the west end of said bridge and were in first-class condition; that the threads on the bolts and nuts were perfect and in good condition and had not been slipped in any way, and that, in the opinion of this witness, the said nuts had been removed from said bolts and said bolts from the angle bars and rails before this wreck occurred; that this witness and the defendant used and ob-
166 served all possible care in maintaining said railroad and all its parts and everything connected therewith, and this defendant could not have known by the exercise of the greatest care that the said rail had been displaced before said wreck occurred, or that the said nuts, bolts, angle bars, or fish-plates or either of them, before that time, and that it could not have prevented said wreck by the exercise of the greatest care, caution, and circumspection.

The plaintiff objects to the evidence as incompetent, immaterial, and irrelevant and not within the issues of this case. The objection is sustained, and the defendant excepts to the ruling of this court.

The defendant now offers to prove by the witness R. W. DAY that the railroad and said bridge were in all respects such as is accepted by and were in general use and found to be sufficient and approved by the best and most skillfully managed railroads in the U. S.; that — the selection of the materials of which said bridge was constructed and maintained the defendant used and exercised the greatest possible care; that the plan and construction and maintenance of said railroad track, bridge, and the ties, rails, sleepers, bridge timbers, and all of the parts thereof were of the very best kind and character and were such as the most carefully, prudently, and skillfully managed railroad- in the U. S. exercise and observe in such matters; that the ties, rails, bridge timbers, and fastenings and everything connected therewith, at the place of said wreck and at all other places were in all respects such as had been found sufficient by the most skillfully and prudently managed railroads in the U. S., and that said railroad track and bridge and the ties, rails, bolts, fastenings, and appliances connected therewith were in all respects sound at all times in question and were in perfect condition; that the said railroad and bridge and the ties, bridge, rails, fish-plates, and all the

appliances and fastenings thereof were daily inspected by the employés of the defendant in the usual and proper manner and in the manner in use on the best-managed railroads in the United
167 States; that the defendant observed the greatest care in establishing and keeping employees and servants to care for, inspect, and keep said railroad and bridge and everything connected therewith in proper condition; that all of said employees were skillful and careful in their work and were men of good judgement and were qualified to perform their duties in caring for and maintaining said railroad.

To which evidence the plaintiff objects as incompetent, immaterial, and irrelevant and not within the issues of this case. The objection is sustained by the court; to which ruling the defendant duly excepts.

Depositions of sundry witnesses taken before me, W. B. Comstock, notary public within and for the county of Lancaster, in the State of Nebraska, on the 10th day of November, in the year 1896, between the hours of eight o'clock a. m. and four o'clock p. m., at the post-office building, in the town of Sprague, in said county, pursuant to the annexed notice, to be read in evidence in behalf of the plaintiff in an action pending in the district court of the 7th judicial district of Nebraska in and for Thayer county, in which Bertha Zernecke, as administratrix of the estate of Ernest H. Zernecke, deceased, is plaintiff and The Chicago, Rock Island and Pacific Railway Company is defendant.

W. P. CROZIER, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Examined by Mr. MONGER:

1 Q. What is your name and residence?

A. W. P. Crozier; Martell, Nebraska.

2 Q. Do you remember the wreck that occurred on the Rock Island railway between Martell and Lincoln, on August 9th, 1894?

A. Yes, sir.

3 Q. Where were you on that day?

A. At home.

4 Q. How far is your house from the Rock Island station at Martell?

168 A. About forty rods.

5 Q. Did you see on that day anybody going towards the station just before the time the evening train towards Lincoln came through?

5 A. Yes, sir.

6 Q. Where did you see them?

6 A. Seen them on the north side of the house.

7 Q. How far from the house were they, and how far from you?

7 A. They were about twenty rods from the house and about 10 steps from where I was.

8 Q. How many were they and where were they going?

8 A. There were two of them; they were going toward the depot.

9 Q. How long before train time was this, if you know?

9 A. It was along toward dark. I was down fixing the gate.

10 Q. Who were these two parties you saw, if you know?

10 A. One of them was Henry Peters and the other I did not know; he was a stranger to me.

11 Q. What kind of a looking man was he?

11 A. My recollection was that he was a dark-complexioned man—heavy set man—with a beard on his face.

12 Q. Was this along a road or path or across the fields?

12 A. It was along a path from Martell to Sprague.

13 Q. The wagon road from Martell to Sprague runs which direction from your house?

13 A. From Martell the wagon road goes north from Martell one-quarter of a mile, then about three-fourths east, then one mile south to Sprague.

14 Q. Is there any road from your house to this wagon road? State where it is.

14 A. Yes; from my house I go 20 rods north and about 30 rods east and one-quarter of a mile north again.

15 Q. Where from your house did you see these parties?

169 15 A. Northeast on the 30 rods of road running east and west.

16 Q. Had you seen these parties on that day before this time?

16 A. Yes.

17 Q. Where and when?

17 A. In the middle of the forenoon, about nine o'clock, I should think, after the Rock Island train from the north came into Martell; they got off the train.

18 Q. And where did they go—in what direction did they go?

18 A. They went southeast towards Sprague.

19 Q. Were these same parties?

19 A. Yes.

20 Q. The nearest house to yours is in what direction and how far?

20 A. North, about 100 rods—a farm-house.

21 Q. How many houses in Martell at that time?

21 A. Two—the depot and section-house.

22 Q. How near is the next nearest house to Martell except the one you mentioned and your own?

22 A. About three-fourths of a mile west.

23 Q. Is there any road that runs from the depot west from Martell?

23 A. There is no road there now and am not positive whether there was one there in 1894 or not.

24 Q. About how long before the train went north did you see these men?

24 A. About a half hour before train time; I am not sure.

W. P. CROZIER.

L. W. Billingsley, attorney for defendant, objects to each question hereinbefore made as incompetent, immaterial, and irrelevant, and it is agreed by the parties hereto that this objection shall appear to have been made after each and every question hereinbefore made.

ELIZA OBERMEYER, of lawful age, being by me first duly examined, cautioned, and solemnly sworn as hereinafter certified, deposeth and sayeth as follows:

170 1 Q. What is your name and where do you live?

1 A. Eliza Obermeir. I live a mile north of Sprague, Nebraska.

2 Q. Do you remember the wreck on the Rock Island railway between Martell and Lincoln on August 9th, 1894?

2 Q. Yes, sir.

3 Q. Did you see anything of a man named Henry Peters and Mr. E. H. Zernecke on that day?

3 A. Yes, sir.

4 Q. About what time that day and where?

4 A. At our place about eight o'clock in the evening. I cannot tell exactly.

5 Q. Do you live on the wagon road that runs from Sprague to Martell?

5 A. Yes, sir.

6 Q. Did you talk with these men at that time?

6 A. Yes, sir.

6 Q. How did they come to stop at your house?

6 A. They came from Sprague and stopped to see Mr. Peters' little boy who was living at our place.

7 Q. How long were they there?

7 A. I guess about ten or fifteen minutes.

8 Q. Which direction did they go when they left your house?

8 A. Went south about twenty rods, and then turned west on the Martell road.

9 Q. How far from Martell and how far from Sprague do you live?

9 A. Three-fourths of a mile east from Martell, and a mile and 20 rods north from Sprague.

ELIZA OBERMEIR.

L. W. Billingsley, attorney for defendant, objects to each question hereinbefore made as incompetent, immaterial, and irrelevant, and it is agreed by the parties hereto that this objection shall appear to have been made after each and every question hereinbefore made.

171 A. J. MCCLAIN, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Examined by T. C. MUNGER:

Stipulation.

It is hereby stipulated between the plaintiff and defendant in this case that the testimony of A. J. McClain and W. J. Taylor may be taken in shorthand by J. E. Ferris and reduced to writing, and the signing of the parties is hereby waived.

Q. You may state your name, occupation, and place of residence.
A. A. J. McClain; postmaster.
Q. You live at Sprague?
A. Yes, sir.
Q. Do you remember the wreck that occurred on the Rock Island railsa on August 9th, 1894, between Martell and Lincoln?
A. I do.
Q. Did you on that day see Mr. E. H. Zernecke, of Lincoln?
A. Yes, sir.
Q. Where did you see him?
A. In Sprague.
Q. What time?
A. In the morning, the neighborhood of—well, between 8 and 10 o'clock—some time in the forenoon; couldn't say the time; it was in the forenoon.
Q. Any other time?
A. In the evening also.
Q. At what time?
A. Why, I should judge it was from 5 to 6—to 7—along in the evening, about supper time.
Q. Where was he going?
A. I could not say.
Q. Who was with him?
172 A. Henry Peters.
Q. Did you see which direction they were going?
A. Why, yes; they went east from here.
Q. From where?
A. From the town pump.
Q. Is the town pump in the main road?
A. At the four corners of the street.
No. 1 Q. Where does that road lead to from the town pump?

Counsel for defendant objected as incompetent, immaterial, and irrelevant.

A. Could not say. It leads to Lincoln, running north; it *it* only goes about one block east.

Counsel for defendant moves to strike out the testimony of witness above given as incompetent, immaterial, and irrelevant, having no tendency to sustain any of the issues in this case.

Witness excused.

STATE OF NEBRASKA, } ss:
Lancaster County, }

I, W. B. Comstock, a notary public in and for Lancaster county, Nebraska, duly commissioned and qualified, certify that W. P. Crozier, Eliza Obermeir, and A. J. McClain were by me first severally duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed as above set forth were reduced to writing by myself, excepting the typewritten portion thereof which was written by J. E. Ferris, in accordance with the stipulation hereinbefore set forth, who is not interested in the suit, in my presence and in the presence of the witnesses respectively, and were respectively subscribed by said witnesses in my presence, with the exception of the deposition of A. J. McClain, the signing of which was waived by the parties hereto, as shown by the stipulation in said deposition, and said depositions were taken at the time and place in the annexed notice
173 specified; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 11th day of November, 1896.

W. B. COMSTOCK,
Notary Public.

[SEAL.]

My commission expires April 14th, 1897.

Witness fee, W. P. Crozier	$2.00
Swearing witnesses, 3	.30
Certificate	.25
Writing deposition	1.00
Total	3.55
Witness Eliza Obermeir	2.00
	5.55

Paid by plaintiff.

W. B. COMSTOCK.

STATE OF NEBRASKA, *County of Jefferson*, } ss:

BERTHA ZERNECKE, as Administratrix of the Estate of Ernest H. Zernecke, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company, Defendant.

Caption and Certificate of Depositions.

Deposition of sundry witnesses taken before me, John Ruppell, a notary public within and for the county of Jefferson, State of Nebraska, on the tenth day of November, A. D. 1896, between the hours of eight a. m. and 12 p. m., at ——, in said county, pursuant to the annexed notice, to be read in evidence in behalf of the plaintiff in an action pending in the district court of the 7th judi-
174 cial district, in Thayer county, in the State of Nebraska, in an action in which Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased, is plaintiff and The Chicago, Rock Island and *the* Pacific Railway Company is defendant.

Thomas C. Munger appearing for the plaintiff and L. W. Billingsley appearing for the defendant.

CHARLES COPP, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

1 Q. State your name and business.
1 A. Charles Copp; C., R. & P. station agent.
2 Q. Where were you living on the 9th day of August, 1894, and what was your business?

Defendant objects as incompetent, immaterial, and irrelevant.

2 A. Martell, Nebraska; station agent C., R. & P.
3 Q. Do you remember about the wreck and when that occurred?

Defendant objects — incompetent, irrelevant, and immaterial.

3 A. On the night of August 9th, 1894.
4 Q. Where was that wreck?

Defendant objects as incompetent, immaterial, and irrelevant.

4 A. It was about five miles south of Lincoln.
5 Q. Did any passenger get on the train at Martell that was wrecked that night?

Objected to as incompetent, immaterial, and irrelevant.

5 A. Yes; there were two gentlemen passengers.

6 Q. Were there more passengers than two that got on that train at Martell that night?

Objected to as incompetent, immaterial, and irrelevant.

6 A. No.
7 Q. Who were they, if you know?

Objected to as incompetent, irrelevant, and *incompetent.*

7 A. Henry Peters and another man.
8 Q. Did they buy tickets before they got on the train?

Objected to as incompetent, immaterial, and irrelevant.

175 8 A. Yes.
9 Q. To what point, if you remember?

Objected to as incompetent, immaterial, and irrelevant.

9 A. To either Lincoln or Omaha.
10 Q. What kind of a looking man was the other man that was with Mr. Peters?

Objected to as incompetent, immaterial, and irrelevant.

10 A. He was rather a stout man with a black beard.
11 Q. Had you seen these same two persons before on that day?

Objected to as incompetent, immaterial, and irrelevant.

11 A. Yes.
12 Q. Under what circumstances?

Objected to as incompetent, immaterial, and irrelevant.

12 A. They arrived on the morning train from the East and they went south towards Sprague.
13 Q. You were acquainted with Peters, were you?

Objected to as incompetent, immaterial, and irrelevant.

13 A. Yes; very slightly; had seen him two or three times.
14 Q. Do you know the name of the man who was with Mr. Peters that night?

Objected to as incompetent, immaterial, and irrelevant.

14 A. Yes.
15 Q. What was his name?

Objected to as incompetent, immaterial, and irrelevant.

15 A. Ernest H. Zernecke.
16 Q. You may look at this picture marked Exhibit K by the notary and attached to this deposition and state if it resembles the man who was with Peters that night and got on the train at Martell.

Objected to as incompetent, immaterial, and irrelevant.

16 A. I recognize the picture as resembling Mr. Zernecke.
17 Q. Is that picture, Exhibit "K," a good likeness of Mr. Zernecke?

Objected to as incompetent, immaterial, and irrelevant.

176 17 A. It is.

CHAS. COPP.

(Here follows photograph marked p. 176.)

(Picture attached to deposition.)

EXHIBIT "K."

Townsend Elite Studio 226 N11th St Lincoln Neb

No. 274
C. R. I & P. Ry. Co. } p 176.
Bertha Zumwalt

STATE OF NEBRASKA, } ss:
County of Jefferson, }

I, John Rupppell, a notary public of Jefferson county, State of Nebraska, do hereby certify that Charles Copp was by me first severally and duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him respectively subscribed, as above set forth, *were* reduced to writing by me and in the presence of the said witness respectively, and was subscribed by the said witness in my presence, and was taken at the time and place in said notice specified; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit, and there has been hereto attached one exhibit, "K."

In witness whereof I have hereunto set my hand
177 [SEAL.] and seal this 10th day of November, A. D. 1896.

JOHN RUPPELL,
Notary Public.

Commission expires Feb'y 21, 1899.

Caption.

Deposition of sundry witnesses taken before me, J. E. Ferris, a notary public, duly commissioned and qualified, within and for the county of Lancaster, in the State of Nebraska, on the tenth day of October, in the year A. D. 1896, between the hours of 9 a. m. and 6 p. m., in said county, pursuant to the annexed notice, to be read in evidence in behalf of the plaintiff in an action pending in the district court of the seventh judicial district of Nebraska in and for Thayer county, in which Bertha Zernecke, administrator of the estate of Ernest H. Zernecke, deceased, is plaintiff and The Chicago, Rock Island and Pacific Railway Company is defendant.

Appearances: John M. Stewart, for plaintiff; Robert J. Green, for defendant.

Stipulation.

The following stipulation was made and entered into between the parties in this case in my presence this day:

"It is hereby stipulated and agreed by the parties to this suit that the signing of the depositions by the several witnesses respectively shall be waived, and that the depositions of witnesses, taken pursuant to the notice hereto attached, shall be admitted in evidence as the depositions of such witnesses without there signature thereto."

J. C. PUETZ, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Examined by Mr. JOHN M. STEWART:

Q. You may state your name, residence, and occupation.
A. J. C. Puetz; traveling salesman; Lincoln, Neb.

Q. How long have you resided in Lincoln?
A. Nine or ten years.
Q. And have you during that time been engaged as a
178 travelling salesman?
A. Yes, sir.
Q. Do you remember the circumstance of the wreck that occurred on the Chicago, Rock Island & Pacific railway on August 9th, 1894, just south of this city?
A. Yes, sir.
Q. Were you on that train that was wrecked?
A. Yes, sir.
Q. Where did you get on at?
A. Fairbury, Nebraska.
Q. And where did the wreck occur?
A. At the bridge close by Lincoln.
Q. South?
A. South of Lincoln.
Q. How many cars were there in that train?
A. Two cars.
Q. Which coach were you in at the time of the wreck?
A. The rear car.
Q. And what was the car in front of it—what kind of a car?
A. Combination car, fore part being given up to baggage, mail, and express, and rear part of it to smoking apartment.
Q. What was the last stop before the wreck occurred?
A. I think at Martell.
1 Q. And at the time *of* the wreck occurred—just before the wreck occurred—about what speed would you say the train was making?

Counsel for defendant objected, no foundation laid, incompetent, immaterial, and calling for a conclusion of witness; not a proper subject for expert testimony.

A. About fifty to 60 miles an hour.
2 Q. What indications, if any, were there as to the speed of the train, did you notice?

Counsel for defendant objected as calling for a conclusion of witness, incompetent, immaterial, and no foundation laid.

A. Why, the train was running very fast; in fact it was
179 behind time, trying to make up time. It seemed to me they were running as fast as they could turn the wheels.

Counsel for defendant moved to strike out the last preceeding answer of witness as incompetent, immaterial, not responsive to the question, but a matter volunteered; not sufficient foundation laid and not a proper subject for non-expert testimony.

3 Q. Just describe how the train was wrecked.

Counsel for defendant objected as incompetent, immaterial, assuming a wreck as having occurred; not an element of damages in this case; not in the issues in this case.

A. The train left the track at the bridge, approach of the trestle crossing the B. & M. and U. P. tracks, and ran over the ties for a distance before it went off.

Q. About how high was the track over the ground where the train left it?

A. About 30 feet.

Q. What became of the train, the coaches?

A. Burned up; destroyed by fire.

Q. Were you in the smoker before the wreck occurred?

A. Yes, sir.

Q. About how long before did you leave the smoker?

A. As we were going into Martell, 10 or 15 minutes before the train did—no; not to exceed 5 minutes.

Q. How many persons were in the smoker at the time you were in there?

A. At the time I was in, seven or nine.

Q. Eight after you left?

A. Yes, sir.

Q. And did the smoker take fire and burn up at once?

A. No, sir.

Q. How long after the wreck?

A. Might have been 10 minutes or fifteen minutes.

180 Q. Before it got a-fire?

A. Yes, sir.

4 Q. Were any of the parties taken out of the smoker?

Counsel for defendant objected; no foundation laid; incompetent, immaterial, and not an element of damages in this case.

A. No, sir.

Q. Did the rear coach also burn up?

A. Yes, sir.

Witness excused.

By agreement of both parties to this suit, by their attorneys, the further taking of this deposition was adjourned to Monday, October 12th, 1896, at 9 a. m.

LINCOLN, NEBRASKA, *October* 12*th*, 1896.

Pursuant to adjournment, the parties to this case being present by their attorneys and the witnesses Walton G. Roberts, the further taking of this deposition was continued by taking the testimony of Walton G. Roberts, as above set forth.

J. E. FERRIS,
Notary Public.

[SEAL.]

WALTON G. ROBERTS, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Examined by JOHN M. STEWART:

Q. Give your name, age, place of residence, and occupation.

A. Walton G. Roberts, Lincoln, Nebraska; undertaker.

Q. How long have you been in the undertaking business in Lincoln?

A. Almost nine years for myself.

Q. Do you remember the circumstances of the wreck on the Chicago, Rock Island railway line a little south of this city on August 9th, 1894?

A. I remember there was a wreck there; yes, sir.

Q. Were you at the scene of the wreck? If so, when—how long afterwards?

181 A. I was at the scene of the wreck; yes, sir.

Q. How long afterwards?

A. It was the next morning.

Q. Were you there in a professional capacity?

A. Yes, sir.

Q. Were the remains of any persons taken out from the wreck?

A. Yes, sir.

Q. How many?

A. Eleven.

Q. What were the condition of those bodies?

A. Some of them were badly charred and some of them were not. Two of them were consumed by the heat and flames, except some of the skulls and a few bones.

Q. What were done with those remains?

A. They were taken to my place.

Q. Here in the city of Lincoln?

A. Yes, sir.

Q. And what was done with them there?

A. They were prepared for burial.

Q. Did you bury them—conduct the service?

A. I prepared them for burial.

Q. Then what became of them?

A. Some of them were buried here, and some shipped away.

Witness excused.

Certificate.

I, J. E. Ferris, a notary public, duly commissioned and qualified, within and for the county of Lancaster, in the State of Nebraska, do hereby certify that J. C. Puetz and Walton G. Roberts were by me first severally duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively given, as above set forth, were reduced to writing by myself,

182 in the presence of the witnesses respectively, and were taken at the time and place in the annexed notice specified and according to the terms of the stipulation also annexed; that the stipulation annexed was entered into between the parties in my presence; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit, and said depositions were commenced at the time and place in said notice specified, and continued by adjournment from day to day as above stated.

In testimony whereof I have hereunto set my hand and official seal this 7th day of November, 1896.

J. E. FERRIS,
Notary Public.

My commission expires April 12th, 1898.

[SEAL.]

Fees.

Administering two oaths, 10c	.20
16 folios at 20c. each	3.20
Two certificates at 25c	.50
Postage	.15
	4.05

Deposition of witness taken before me, James E. Noel, a notary public within and for the county of Howell, in the State of Missouri, on the sixth day of November, in the year 1896, between the hours of 9 a. m. and 6 p. m., at the town of Willow Springs, in said county, pursuant to the annexed notice, and at the time and place stated in said notice, to be read in evidence in behalf of the defendant in an action pending in the district court of Thayer county, State of Nebraska, in which Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased, is plaintiff and The Chicago, Rock Island and Pacific Railway Company is defendant.

W. F. Evans appeared for the defendant.

HARRY FOOT, of lawful age, being by me first duly sworn, examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows:

183 1 Q. State your name, age, and place of residence.
A. Harry Foote; 25 years; Howell county, Mo.
2 Q. How long have you lived in Howell county, Mo.?
A. Since the 13th day of last March.
3 Q. Where did you live prior to that time?
A. Horton, Kansas.
4 Q. What is your present business?
A. Farming, and have been since I moved here.
5 Q. What was your business while residing in Horton?
A. Railroading.
6 Q. For what company were you working?
A. The Chicago, Rock Island and Pacific Railway Co., the defendant.
7 Q. How long were you in the employ of the defendant?
A. Seven or eight years.
8 Q. In what capacity were you employed?
A. Brakeman.
9 Q. What were you doing on the ninth of August, 1894?

A. Braking on passenger train for the defendant.

10 Q. Between what points were you running as a brakeman at that time?

A. Council Bluffs, Iowa, and Belleville, Kansas.

11 Q. How long had you been running between those points as a brakeman on passenger train for the defendant?

A. About a year and a half.

12 Q. What was the number of the train on which you were employed during that time?

A. Seven & eight.

13 Q. What train were you running on, if any, on the evening of August 9th, 1894?

A. No. 8.

14 Q. Which way was your train running?

A. East.

15 Q. What point had you left that evening and where were you going?

184 A. Left Belleville, Kansas, for Council Bluffs, Iowa.

16 Q. Did your train meet with any accident that evening? And, if it did, state what it was and the time and place where it occurred.

A. Yes; I met with an accident; the train was derailed and thrown from the track, about 9.35 p. m., about four miles southwest of Lincoln, Neb., at crossing of the overhead bridge or trestle over the B. & M. railroad and the U. P. railroad.

17 Q. Do you know about the speed the train was running at the time of the accident?

A. Yes.

18 Q. Please state what the speed was.

A. About 45 miles an hour.

19 Q. About how long had it been running at that speed?

A. We had run that fast or faster ever since the run had been on; something like a year and six months.

20 Q. Please state if that was the usual or unusual speed of that train.

A. It was the usual speed.

21 Q. Where were you at the time the accident occurred?

A. Sitting in the rear seat of the rear car.

22 Q. What did the train consist of?

A. Of a combination car, first-class coach, and engine and tender.

23 Q. Is that the wreck or accident in question in this case?

A. Yes, sir.

24 Q. In what way was the train supplied with brakes?

A. Tender and both cars connected with air.

25 Q. What, if anything, did you do immediately after the wreck occurred?

A. I looked after the injured persons until I had all the injured ones taken from the train.

185 26 Q. Where on the track did this accident occur?

A. On the west end of the trestle over the B. & M railroad and the U. P. railroad.

27 Q. After you removed the injured passengers, state what you did, if anything, in examining the trestle where the accident occurred.

A. I went upon the trestle; examined it.

28 Q. How soon did you make the examination after the accident occurred?

A. About ten minutes.

29 Q. Had any change been made in the trestle or track after the wreck and before you made the examination.

A. No, sir.

30 Q. Please state what you found by the examination.

A. I found a claw-bar, sometimes called a clinch-bar, a pair of pinchers, and angle bar, bolts, and two nuts. The pinchers, angle bar, bolts, and nuts were found under the first joint of the west end of the bridge, and the claw-bar was found on the fill or bank south of the track about twenty feet. The first and second rails on the south sides of the bridge and immediately east from the west end of the bridge were turned over to the south or southeast and from six to twelve inches south of the line of the rail west thereof.

The second rail on the south was bent out of shape and turned farther around than the one west of it. I also examined spike-holes on the south side of the bridge, which had held the south rail at the west end of the bridge in position. The condition of the holes were that the spikes must have been drawn with a claw-bar. The impression of a claw-bar or some hard instrument was on the ties at each of the spike-holes, and the holes appeared new or fresh as if the spikes had been out of them only a few minutes. The nuts that I found were under the first joint east of the west end of the
186 trestle and on the south side and within a few inches of the bolts. The threads on the bolts were in good condition as though the nuts had been removed a few minutes before. I also observed immediately east of the first joint of the west end of the bridge and on the south side marks or indentations made by the flange of the wheels of the engine and cars. These marks on the ties were on the south side of the bridge, and a few inches north of the south rail near the west end of the bridge or trestle, and in line with the rail on the south side that extended west of the bridge.

31 Q. Please state the condition your train was in at the time of and before the accident.

A. In good condition; everything was in first-class condition.

22 Q. About how long had your train been running at the speed you have mentioned?

A. About one year and a half.

33 Q. Please state whether or not during any of that time and before the accident in question an accident of any kind had occurred to your train while running between the points you have mentioned.

A. Nothing while running.

34 Q. Please state who the persons were you first saw after the accident and how soon did you see them after the accident.

A. I saw a couple of farmers and a colored man, George Wash-

ington Davis, coming down off the fill of the west end of the bridge between five and ten minutes after the wreck occurred.

35 Q. Please state the manner in which your train was operated and run on the evening of the accident, before and at the time of the accident.

A. The same as it had been ever since I had been on the run, with great care and caution.

36 Q. How was the train manned at the time of the accident?

A. By engineer, fireman, baggageman, brakeman, and conductor.

37 Q. How long has it been since you worked for the de-
187 fendant or was in its employ?

A. About nine months.

HARRY FOOTE.

I, James C. Noell, a notary public within and for the county of Howell, in the State of Missouri, do hereby certify that Harry Foote was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by Alice Noell, who is not interested in the suit, in my presence and in the presence of the witness and was subscribed by the said witness in my presence and was taken at the time and place in the annexed notice specified; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit, and that said deposition was commenced and taken at the time and place on said notice specified.

In testimony whereof I hereunto set my hand and affix my notarial seal this sixth day of November, A. D. 1896.

My commission expires February 24, 1899.

[SEAL.]

JAMES C. NOELL,
Notary Public.

Notary fees	$2.60
Witness fees	1.00

Paid by defendant.

STATE OF NEBRASKA, } ss:
Thayer County, }

In the District Court of Thayer County, State of Nebraska.

BERTHA ZERNECKE, Administratrix of the Estate of Ernest H. Zernecke, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

188

Depositions.

Depositions of sundry witnesses taken before me, a notary public, duly commissioned and qualified for and residing in the county of Lancaster and State of Nebraska, on the 21st day of October, in the year 1896, between the hours of 9 a. m. and 6 p. m., at the office of L. W. Billingsley and R. Green, at 210 South 11th street, in the city of Lincoln, in said county, pursuant to the annexed notice, to be read in evidence on behalf of the defendants in an action pending in the district court of Thayer county, in which Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased, is plaintiff and The Chicago, Rock Island and Pacific Railway Company is defendant.

(Notice attached in usual form, the receipt of which is acknowledged on the 19th day of October, 1896, by Stewart and Monger, attorneys for plaintiff.

LEWIS RYAN, being produced and duly sworn, testified as follows:

Examined by Mr. GREEN:

1 Q. Mr. Ryan, you may state your name, age, and place of residence.
A. Lewis Ryan is my name; age, twenty-one; 812 E street.
2 Q. What relation are you to Frank Ryan?
A. He is my cousin.
3 Q. And you and your cousin, respectively, are sons of Robert and Thomas Ryan?
A. Thomas and Robert.
4 Q. How long have you lived here?
A. About sixteen years.
5 Q. Where were you on the 8th day of August—Wednesday evening, the 8th day of August, 1894?
A. I was out walking on the Union Pacific track south of the city.
6 Q. With whom?
A. My cousin Frank.
7 Q. Did you overtake any one on the road?
A. Yes, sir.

189 8 Q. Where?

A. A little south of the Penn. road; what is known as the Penn. road.

9 Q. And on what road or highway were you?

A. On the Union Pacific track.

10 Q. About how far from the Penn. road was it?

A. It is about two blocks, I should say.

11 Q. What were you doing—you and your cousin?

A. A-walking.

12 Q. You know where the Rock Island wreck occurred on the night of August the 9th, 1894?

A. Yes, sir.

13 Q. About how far from the place where the wreck occurred were you when you overtook this person on the track?

A. It is about between a mile and a half and two miles.

14 Q. How many times did you see the person?

A. Three.

15 Q. Describe the person.

A. He was a colored man, looking something like an office official; tall; weight between 180, probably 190, and heavy, square shoulders.

16 Q. What sort of a *gate*?

A. Walking very slow, and had a shuffling *gate*.

17 Q. What, if anything, did he have with him?

A. When I was going by him—up to him—I supposed he had a gun and game sack in his hand and over his shoulder, and when I got up close I saw it was a crowbar.

18 Q. What else?

A. And a sack of some coarse material.

19 Q. Just describe the appearance of the sack he had in his hand.

A. It was what appeared to be a gunny sack rolled up at the mouth—about a foot rolled down at the mouth—and it had an angler object in it.

190 20 Q. How was he carrying the crowbar?

A. Over his left shoulder; had hold of it with his left hand.

21 Q. How close were you to him at any time?

A. We passed him twice within about three feet.

22 Q. You may state whether or not you are positive as to what he had; and, if so, what it was.

A. I know it was either a crowbar or a claw-bar, because I was looking at him closely when we passed him.

23 Q. When did you next see this man?

A. Two or three days after this.

24 Q. And where was that?

A. At the city jail.

25 Q. Did you observe his gait at that time?

A. No; not the first time; no.

26 Q. Did you at any time?

A. Yes, sir.

27 Q. Now, you may state whether or not his gait was similar to the man when you saw him on the Union Pacific track?

A. It was the same gait—slow; it was lazy, shambling gait.

28 Q. What time in the evening of the 8th of August, 1894, was it you saw this man?

A. About half past eight.

29 Q. What kind of clothes did he have on?

A. A very dark-colored suit.

30 Q. Did you see the clothes that were exhibited in the case of The State of Nebraska against George Washington Davis, tried in the district court of Lancaster county last fall?

A. Yes, sir; I saw the coat.

31 Q. You may state whether or not the clothes that this man wore when you saw him on the Union Pacific track were similar to that coat that *were* put in evidence in that case.

A. As near as I can remember, it was the same cut and the same shape of coat.

191 32 Q. Do you know of a hut or shanty in the weeds down near the U. P. track near that place?

A. I do.

33 Q. Where is that?

A. About three or four hundred feet south of the Penn. road and about a hundred feet to the right of the U. P. track.

Redirect by Mr. GREEN:

52 Q. How soon after the wreck occurred was it that you made a statement, if you made any, of these facts to the authorities?

A. I made a statement to my father the next morning about eight o'clock, and that morning he made a statement to the authorities.

LOUIS RYAN.

Witness excused.

ERNEST SHELLENBERGER, of lawful age, being first called, cautioned, and solemnly sworn, *and* hereinafter certified, testified as follows:

Examined in chief by R. J. GREENE:

53 Q. Mr. Shellenberger, please state your name, age, and place of residence.

A. Ernest Alphonzo Shellenberger; age, 22; residence, Lincoln, Nebraska.

54 Q. Are you acquainted with George Washington Davis, who was charged and convicted of wrecking the Rock Island train on the night of the 9th of August, 1894?

A. I am.

55 Q. How long have you known him?

A. Known him about three years.

56 Q. Were you acquainted with him before the 9th of August, 1894?

A. I was.

57 Q. You may state whether or not you saw him that night.

A. I saw him on the night of the wreck.

58 Q. Whereabouts?
192 A. Well, south of the wreck; probably about a half a mile.
59 Q. On what road or highway?
A. The Rock Island railway.
60 Q. On which side of the Salt Creek bridge did you meet him?
A. I met him south.
61 Q. South of the Salt Creek bridge?
A. Yes, sir.
62 Q. Who was with you, if any one?
A. Mervin Crawford.
63 Q. Did you have any conversation with George Washington Davis?
A. I did.
64 Q. How was he dressed?
A. Why, he had on a dark pair of pants, I think, with a vest and no coat on.
65 Q. He had no coat on?
A. Had on no coat at all.
66 Q. State whether or not he had a lantern with him.
A. He was carrying a lantern.
67 Q. About how long after the wreck occurred was this, if you know?
A. I should judge it was about an half an hour.

Cross-examination.

Examined by Mr. STEWART:

68 Q. Where were you living at that time?
A. I was living at Mr. Preston's, about a mile from the wreck; just seven miles south of here, on First street.
69 Q. Working for Mr. Preston?
A. Yes, sir.
70 Q. Still living with him?
A. No, sir.
71 Q. How long had you known Davis before the wreck occurred?
A. Known him for over a year.
72 Q. Where did you get acquainted with him?
A. He worked for my father.
193 73 Q. Where?
A. Two weeks, pitching hay.
74 Q. On your father's farm?
A. Yes, sir.
75 Q. Davis was living down in that vicinity?
A. Yes, sir.
76 Q. What time was it this wreck occurred?
A. Between nine and ten o'clock.
77 Q. Between nine and ten?
A. Yes, sir; I believe so.
78 Q. Well, do you know which it was nearest to, nine or ten?
A. It was nearest to ten.

79 Q. And what time of night was it you met him, Davis?
A. Well, I think it was about half past ten.
80 Q. It was after the wreck, was it?
A. Yes; it was after the wreck.
81 Q. Was you at the wreck?
A. Yes, sir.
82 Q. And was going home from it when you met him?
A. No; I was going to the wreck when I met him.
83 Q. You say you had a talk with him then?
A. Yes, sir.
84 Q. About the wreck?
A. Yes, sir.
85 Q. And then you went on down to the wreck?
A. Yes, sir.
86 Q. Where was he living at this time—who was he working for?
A. Don't know as he was working for anybody. He had been working for Mr. Lonsdale before.

E. A. SHELLENBERGER.

Witness excused.

194 FRED FOSTER, being called and duly sworn as hereinafter certified, testified as follows:

Examined in chief by Mr. GREEN:

87 Q. State your name, age, and place of residence.
A. Fred Foster; Roca, Nebraska; age, twenty-nine.
80 Q. What was your business, M-. Foster, on the 9th day of August, 1894?
A. Section hand on the Rock Island railroad.
88 Q. On what section?
A. Rokeby section.
89 Q. What is the extent of that section?
A. Five miles and a half.
90 Q. And from what mile post to what mile post, if you remember?
A. I don't remember. We came within a half mile of that Rock Island bridge, where the wreck occurred.
91 Q. It is the section that ends just south of the Rock Island bridge?
A. Yes; I forgot the number of that section.
92 Q. Where were you from six to nine o'clock of that day, in the evening?
A. At half past six we left the house for the swimming hole down to the Lincoln park. We run our car down to the Rock Island bridge and transferred to the Union Pacific and run down to the swimming hole—run down to the swimming hole and set our car off and went swimming, and then we came out and came up on the car to the Rock Island and transferred back, and I says to the boys, Let's see how soon we can make it to Rokeby, and I pulled out my

watch, and it was just eight o'clock when we started, and I didn't notice after that what time it was.

93 Q. Who was present with you?

A. Joe Richardson, Del Austin, Lon and Bert Cambridge, Bert Foster, and myself.

94 Q. At that time did you go out on the trestle bridge?

195 A. Yes, sir.

95 Q. You may state whether or not you crossed over the point that is alleged to have been removed and wrecked the Rock Island train.

A. We went at least five or six rails over that point.

96 Q. You may state in what condition the rails and spikes and ties were there over which you went in the evening.

A. They were all right.

97 Q. Were you at the wreck the next day?

A. I was there that night.

98 Q. Did you see the place at which the rail was said to have been removed?

A. Yes, sir.

99 Q. You may state whether or not you crossed over that particular place.

A. We crossed that particular place that very night going out over the Union Pacific track.

100 Q. On the night of August the 9th before the wrecking of the train?

A. Yes, sir.

101 Q. And in what condition was the track, rail, and bridge at that time?

A. It was all right.

102 Q. Are you in the employ of the Rock Island road?

A. Not now.

103 Q. How long since you have been?

A. Since the 15th day of last September.

Cross-examination.

Examined by Mr. STEWART:

104 Q. What time of night did you get to that wreck?

A. About eleven o'clock, as near as I can remember; either eleven or half past eleven; I forget which.

FRED FOSTER.

Witness excused.

196 BERT FOSTER, being called and duly sworn, as hereinafter certified, testifies as follows:

Examined in chief by Mr. GREENE:

105 Q. State your name, age, and place of residence.

A. Twenty-one years old; Roca, Nebraska.

106 Q. What was your business on the 9th day of August, 1894?

A. Working on the Rock Island.
107 Q. What is your business now?
A. Now?
108 Q. Yes.
A. My business ain't much of anything; working for the stove-ware now.
109 Q. How long since you have been employed by the Rock Island?
A. About four months.
— Q. Were you present with Fred Foster and the other gentlemen that he testified to on the night of the 9th of August, 1894?
A. Yes, sir.
110 Q. At the scene of the Rock Island wreck?
A. Yes, sir.
111 Q. What time did you get there?
A. To the Rock Island wreck?
112 Q. Yes, sir.
A. Oh, about eleven or half past, as he said.
113 Q. When had you been there before?
A. I don't know just exactly when we was there before.
114 Q. The same day, I mean.
A. The same day?
115 Q. Yes.
A. I don't know as—we was down there that night, swimming.
116 Q. That is what I mean. *When* were you between the hours of six and nine o'clock on the evening of August 9th, 1894?
197 A. We was at Rokeby.
117 Q. And where else?
A. No place. Oh, we was swimming between six and nine.
118 Q. And at six and nine you were at Rokeby?
A. Yes, sir.
119 Q. What time did you leave Rokeby?
A. Well, about half past six, I guess.
120 Q. Where did you go?
A. Down to Lincoln Park swimming hole.
121 Q. And how did you go?
A. On the hand car.
122 Q. How far did you go on the hand car before you changed tracks?
A. I couldn't tell you that.
123 Q. I say before you changed tracks.
A. Well, it was about a mile and a half.
124 Q. To the Rock Island overhead bridge where it crosses over the U. P. tracks?
A. Yes, sir.
125 Q. Did you look at the track on the first two or three joints on that bridge as you went on it?
A. Yes, sir.
126 Q. In what condition was the track?
A. Good condition.

127 Q. Did you examine the track when you came back from the swimming hole?

A. We didn't examine it, but seen everything was all right.

128 Q. Did you go right over it?

A. Yes, sir.

129 Q. How far north did you go?

A. North?

130 Q. Yes; over the bridge.

198 A. Went out over the U. P. track.

131 Q. What did you go out over that for?

A. To see the U. P. train go under.

132 Q. Then where did you go?

A. To Rokeby.

133 Q. What time did you arrive at Rokeby?

A. About eight o'clock.

134 Q. On your way back to Rokeby did you cross the first two or three joints on that bridge?

A. Yes, sir.

135 Q. In what kind of condition were they when you crossed them?

A. Good condition.

136 Q. Who pushed the hand car out on the bridge?

A. All of us.

Cross-examined by Stewart not offered in evidence.

137 Q. Which way from this bridge is the U. P. track?

A. It runs east and west across the Union Pacific. The U. P. runs under the bridge north and south.

138 Q. How far is Rokeby from this bridge?

A. A mile and a half.

139 Q. What time did you quit work?

A. At six o'clock.

140 Q. And then you went down there and got your supper?

A. Yes, sir.

141 Q. And then went back to the swimming hole?

A. We went to the section-house and got supper, and then went to the swimming hole.

142 Q. You boarded at the section-house?

A. Yes, sir.

143 Q. Where were you when you quit work?

A. At the section-house.

144 Q. You mean you got in there at six o'clock?

199 A. Yes, sir.

145 Q. Then you came up on the Rock Island track and crossed the bridge, you say?

A. Up about the center of the bridge where the Union Pacific runs under.

146 Q. Then what did you do?

A. We transferred there on to the U. P. tracks and went swimming.

147 Q. How did you get your car down on the U. P. track?
A. Carried it down some of the way and pushed it the rest of the way.
148 Q. Which side of the bridge?
A. *The south side* of the bridge.
149 Q. Took it down the embankment, did you?
A. Yes, sir.
150 Q. Quite a job taking it down there, wasn't it?
A. Not very, down hill.
151 Q. Easier to take it down than up, was it?
A. Yes; pushed it down and carried it up.
152 Q. Which joint was it that was all right?
A. The joint at the west end of the bridge.
153 Q. Which way does the bridge run there?
A. East and west.
154 Q. Right due east and west?
A. No; not exactly due east and west; we call it east and west.
155 Q. Which end of the bridge you say you took the car off at when you went down to the swimming hole?
A. West end.
156 Q. You wasn't out inspecting the track, was you, on this trip?
A. Not exactly; no.
— Q. Just noticed it as you went along?
A. Yes; saw it was all right.
157 Q. You say you run clear across the bridge?
200 A. No.
158 Q. Just about the middle?
A. About where the U. P. track is.
159 Q. And then run back up to the west end?
A. After we run out on the bridge we went home.
160 Q. Well, now, when you was going down to the swimming hole, did you run past the west end of the bridge or did you stop and take the car off?
A. We stopped right at the west end of the bridge to take it down to the U. P. track.
161 Q. Didn't cross the bridge at all when you went down first?
A. No.
162 Q. And the next time when you went to come back you run up to the center?
A. Yes, sir.
163 Q. What did you say you done that for?
A. To see the U. P. train go under.
164 Q. Did it go under while you was there?
A. Yes, sir.
165 Q. Was it dark then?
A. No.
166 Q. Getting dark?
A. Just about dusk.

Witness excused.

BERT FOSTER.

WILLIAM E. PAINTER, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

167 Q. Mr. Painter, what is your business?

A. I am chief clerk for the superin*dentend* of the Burlington at Lincoln.

168 Q. How long have you been in the railroad business?

201 A. Since 1875.

169 Q. What are you- duties?

A. Why, in a general way, the supervision of the division under the instructions of the superintendent.

170 Q. What, if anything, do you have to do in the viewing wrecks?

A. In case of a wreck happens it is my duty to see that proper means are taken to put it in a shape—see if any people are injured and see that the track is put in shape for trains.

171 Q. During the course of your employment have you visited many wrecks?

A. A few; couldn't say how many.

172 Q. Made investigations to find out the cause of the wreck?

A. Yes, sir.

173 Q. Did you visit the scene of the Rock Island wreck?

A. Yes, sir.

174 Q. Why did you go there?

A. I was notified that the trestle was burning in such a manner that it was likely to fall on and endanger our track.

175 Q. What time did you go there?

A. About on- o'clock a. m.

176 Q. Did you make an examination of the Rock Island track where the wreck occurred?

A. Yes, sir; a casual one.

177 A Q. Determine the cause of the wreck?

A. Yes, sir.

167 A Q. You may state, Mr. Painter, what you found there—just describe the conditions as you found them.

A. I found where some spikes had been pulled from some bridge ties near the west end of the bridge, and one pair of fish-plates removed from the south rail. There might have been more than that, but I didn't look beyond that.

202 168 A Q. Did you make any examination of the rails and ties at that place?

A. Well, you mean where the wreck occurred?

169 A Q. Yes, sir.

A. Yes; where the marks were where the engine struck the ties.

170 A Q. In what condition were those ties as to being sound?

A. Excepting where the spikes were pulled, they were all right.

171 A Q. And what was their condition?

A. There was a mark showing wheel-marks, but the material was in good condition.

172 A Q. In what condition was the rails?

A. All right—that is, -here was nothing to indicate any imperfection in any way.

173 A Q. Was there anything to show that the trains had been out of order or the track out of order before reaching the point where the rail was displaced?

A. Not so far as I found.

174 A Q. What was the condition of the spike-holes you examined at the place where the rail had been displaced?

A. They were clean, indicating that the spikes had been drawn with a bar.

175 A Q. Can you tell me the difference when a spike is drawn with a bar and when it is forced out?

A. Yes, sir; the tie will indicate that.

176 A Q. In what condition will it be when drawn by a bar?

Mr. STEWART: The defendant object- to this testimony as incompetent, irrelevant, and immaterial and not the best evidence; that the ties themselves would be the best evidence, and for the reason that it is calling for a- opinion of the witness.

177 A Q. In what condition would the spike-hole be in the tie when drawn out by a bar?

203 Mr. STEWART: The defendants object as incompetent, irrelevant, and immaterial and not the best evidence; the ties themselves would be the best evidence; and for the reason that it is calling for the opinion of the witness.

A. It would simply be a clean hole, showing the spike had been lifted out.

178 Q. In what condition would it be if forced or drawn out?

Mr. STEWART: The defendants objects as incompetent, irrelevant, and immaterial and not the best evidence, the ties themselves being the best evidence, and for the reason that it is calling for an opinion of the witness.

A. Ragged. The hole would be ragged.

179 Q. Could you tell from the appearance of those spike-holes whether the spikes had been recently drawn or not?

Mr. STEWART: The plaintiff objects as calling for a conclusion of the witness, and not the best evidence.

A. In that case I couldn't, because I didn't observe the holes themselves close enough. There was the mark of the claw-bar on the top.

180 Q. What marks, if any, were there upon the ties at this place other than those you have already described?

A. On two or three ties I noticed a dent similar to the heel of a clar-bar.

181 Q. What would you say that caused that dent?

Mr. STEWART: The plaintiff objects as calling for a conclusion of he witness, and not the best evidence.

A. The heel of a clar-bar.

182 Q. On which rail had the spikes been drawn that you ha testified to?

204 Mr. STEWART: The plaintiff objects as assuming a fa proving upon which there is no evidence.

A. I think it was the first full rail on the bridge.

183 Q. How far on the bridge did the rail immediately south of run—that is, south and west?

A. About twelve or fourteen feet, I think.

184 Q. Was the rail in place?

A. The rail that was partly on the dump and partly on th ground?

185 Q. Yes, sir.

A. Yes, sir.

186 Q. Was the next rail north and east of that in place?

A. No, sir; it was shoved over to the south.

Q. What indentions, if any, were in line with this rail and i the place where the rail should have been if the track had been i proper condition at the time you saw it?

A. The top of the ties were dented as if struck by a wheel.

187 Q. Were these indentations—were they in direct line with th rail lying immediately south and west of that?

A. Partly, but started toward the north and east.

188 Q. For how long a distance were they in a direct line?

A. I don't know; didn't observe that carefully.

189 Q. Did you make any examination of the north rail opposit this misplaced rail?

A. Just looked at—looked it over—walked alongside of it.

190 Q. What, if anything, did you see with reference to spike drawn there?

A. The north rails appeared to be in place. Further down ther were marks of wheels dropping off the north rail, but some distanc after it had dropped off the south rail.

191 Q. You may state what, in your opinion, was the cause of th wreck.

Mr. STEWART: The plaintiff objects as incompetent, immateria and irrelevant, calling for the conclusion of the witness, an 205 not a competent nor proper question for the witness to ex press a conclusion on.

A. The rails on the south side had been tampered with by fish plates being removed and the spikes drawn, leaving it in such con dition that a train moving over it would crowd the rail out of plac and it would become derailed.

192 Q. What is your place of residence, Mr. Painter?

A. Lincoln.

Cross-examined by Mr. STEWART:

Not offered nor introduced in evidence.

193 Q. Were the rails or ties twisted or broken at the place of the wreck?

A. No; there was no broken rails or ties I could see.

194 Q. No twisted rails?

A. Didn't observe any; none on the bridge.

195 Q. Was there any off the bridge?

A. I didn't see any at all.

195½ Q. You were there, you say, at one o'clock at night?

A. About one o'clock in the morning.

196 Q. What kind of a night was it; was it moonlight or did you have a lantern?

A. I had a lantern. I remember it was starlight; don't remember whether there was any moon or not.

197 Q. Was the track torn where the wreck occurred—any part of the bridge?

A. The only displacement I noticed was at the rail I have described. Men were working beyond where I examined, sawing off the bridge to save it, and whether the rails were displaced farther down or not I don't know. I didn't examine.

198 Q. And you didn't examine the ties?

A. Only a short distance beyond the first joint.

199 Q. How long were you out there?

A. Well, I was out there about two hours and a half working at our track.

206 200 Q. How much time did you put in inspecting point where the cars left the track?

A. About ten minutes, perhaps; don't know exactly.

201 Q. Now, if you should be wrong in your conclusion that those fish-plates had been removed and the spikes withdrawn, what would you say was the cause of the wreck?

Mr. GREENE: The defendant objects as incompetent, immaterial, and irrelevant, and — proper cross-examination.

A. I don't know how to answer that question.

202 Q. Well, where there is a wreck caused by a derailment, what ordinarily is the cause?

Mr. GREENE: The defendant objects as incompetent and immaterial and not proper cross-examination.

A. There are a great many causes that will make a derailment and sometimes cause a wreck.

203 Q. Can you name them?

Mr. GREEN: The defendant objects as immaterial, incompetent, and nor proper cross-examination.

A. A broken wheel, a broken rail, or broken fastening—that is, fish-plate. Derailments have occurred that investigations failed to locate what caused them.

204 Q. Very often it is a matter of speculation, is it not?

Mr. GREEN: The defendant objects as incompetent, irrelevant, and immaterial and not proper cross-examination.

A. Hardly very often; sometimes.
205 Q. Sometimes?
A. Yes, sir.
206 Q. Was the spikes out on both sides of the rail that you say was displaced?
A. Yes, sir.
207 Q. Could the rail be displaced without the spikes being withdrawn to some extent?
207 A. Not under ordinary circumstances.

Redirect examination by Mr. GREEN:

208 Q. In this particular wreck that you examined was the fish-plates broken?
A. I didn't see the fish-plate. I noticed the absence of it.
209 Q. Was the rail broken?
A. No, sir.
210 Q. Was the wheel broken?
A. I didn't see any.
211 Q. You didn't examine the wheel?
A. No, sir.

W. E. PAINTER.

Witness excused.

The further taking of these depositions was here adjourned until tomorrow, October 22nd, 1896, at 9.30 a. m.

OCTOBER 22ND, 1896.

BERT CAMBRIDGE, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

212 Q. State your name and place of residence.
A. Bert Cambridge; my home is at Valparaiso.
213 Q. Nebraska?
A. Yes, sir.
214 Q. Are you acquainted with Fred Foster and Alonzo Cambridge and Bert Foster?
A. Yes, sir.
215 Q. Did you know them on the 9th of August, 1894?
A. Yes, sir.
216 Q. Were you with them on that day?
A. Yes, sir; I was with them.
217 Q. During what hours of that day was you with them?
A. Half past six; right after supper, in the evening.
208 218 Q. From then until when?
A. From six until eight o'clock.
219 Q. Where did you go?

A. Why, we took the hand car and went up swimming by the Rock Island track.

220 Q. Where did you get the hand car?

A. The section boss went with us.

221 Q. I mean at what place did you get it?

A. At Rokeby.

222 Q. What was the section boss' name?

A. George Richardson.

223 Q. Who was in the party?

A. My brother and me and the two Foster boys and another Swede fellow; I don't know his name.

224 Q. And the section foreman?

A. Yes, sir.

225 Q. Where did you go?

A. Up the Rock Island track to the overhead bridge.

226 Q. Did you go over the part of the track on the bridge where the wreck occurred later that night?

A. Yes, sir.

227 Q In what condition was it when you crossed it?

A. I don't know; just the same as the rest of the track was; run over it; it was all right.

228 Q. Did the hand car run over it?

A. Yes, sir.

229 Q. What did you do with the hand car?

A. Put the hand car back on the track and run back over the bridge.

230 Q. What time was that?

A. A little before eight—ten or fifteen minutes, I should judge.

231 Q. Where did you go from there?

A. Got on the hand car and run down to Rokeby.

232 Q. And went over this place where the wreck afterwards occurred?

209 A. Yes, sir.

Cross-examination by Mr. Stewart not offered nor introduced in evidence.

233 Q. Were you working on the section?

A. No, sir; we lived just a h*laf* a mile from there, me and my brother; we were farming on Mrs. Holmes' place.

234 Q. Did you take the hand car off the Rock Island and put it on the U. P. track?

A. Yes, sir.

235 Q. Which end did you take it of- at?

A. At the southwest end.

236 Q. Didn't run across the bridge when you first came down?

A. Not when we first came down. We did when we came back. We run up there while the train went past and under.

BERT CAMBRIDGE.

Witness excused.

Miss LETTIE SIDELL, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

237 Q. Miss Sidell, where do you live?
A. About five miles south of Lincoln.
238 Q. Where were you living on the 9th of August, 1894?
A. At the same place.
239 Q. Did you hear of the wreck that occurred on the Rock Island road that night?
A. Yes, sir.
240 Q. Did you go to the wreck?
A. Yes, sir.
241 Q. About what time, if you know?
A. Shortly after nine o'clock; somewhere along there.
242 Q. Had anybody else gone from your house before you to the wreck?
A. Yes, sir; my father and brother and another man.
210 243 Q. How long had they gone before you went?
A. About ten or fifteen minutes, I guess.
244 Q. How did you go—that is, what direction and what route did you follow?
A. I went southeast until I came to the bridge across Salt creek, and then I went northeast.
245 Q. Then went northeast on the Rock Island track?
A. Yes, sir.
246 Q. How far under the overhead bridge did you go?
A. Just a few steps.
247 Q. Did you see anything the matter with the track or bridge?
A. Yes; I noticed the rail out of place.
248 Q. How much out of place?
A. Oh, eight or ten inches, I guess.
249 Q. Was that when you first went there?
A. Yes, sir.
250 Q. Who was with you, if any one?
A. Mrs. Cowden.
251 Q. How long were you there at the scene of the wreck?
A. Oh, half an hour or three-quarters.
252 Q. Then where did you go?
A. They took the people to the train and I went right home.
253 Q. Took the people to what train?
A. B. and M., I think.
254 Q. Were you there when they put the people on the B. & M. train from the wreck?
A. Yes, sir.
255 Q. And then you went right home?
A. Yes, sir.
256 Q. Who went with you?
A. Mrs. Cowden.
257 Q. What did you find on the way home.

211 A. Found three passes.

258 Q. In whose name were those passes made out?

A. Mr. Cherry.

259 Q. What did you do with these passes?

A. I took them home.

260 Q. Did you meet any one on your way down the track before you found the passes?

A. Yes, sir.

261 Q. Who?

A. Mr. and Mrs. Southwell and Mrs. Southwell's sister.

262 Q. And in what direction were they going?

A. Going towards the wreck.

263 Q. Then what did you do with the passes as soon as you got home?

A. As soon as father came I gave them to him.

264 Q. Ever see those passes afterwards?

A. Yes, sir.

265 Q. Where?

A. At the court-house.

266 Q. In Mr. Cherry's possession?

A. Yes, sir.

267. Who was Mr. Cherry?

A. He was the mail agent on the train that was wrecked, I think.

Cross-examination by Mr. Stewart not offered or introduced in evidence.

268 Q. How far from the wreck did you say you found those passes?

A. At the Salt Creek bridge, about a half a mile from the wreck, I guess; somewhere along there.

269 Q. Did you see Mr. Cherry there that evening?

A. I just seen him, and that is all; I seen him when they took him out.

212 270 Q. What did they do with him?

A. Carried him over to the B. & M. train.

LETTIE SEIDELL.

Witness excused.

ALONZO CAMBRIDGE, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

271 Q. Mr. Cambridge, where do you live?

A. I live in Valparaiso.

272 Q. Where were you living on the 9th day of August, 1894?

A. I was living at Mrs. W. W. Holmes' place, near Rokeby.

273 Q. In Lancaster county?

A. Yes, sir.

274 Q. How far from the place where the Rock Island wreck occurred that night?

A. About two miles.

275 Q. Are you acquainted with Fred and Bert Foster?
A. Yes, sir.
276 Q. J. C. Richardson?
A. Yes, sir.
277 Q. And Bert Cambridge?
A. Yes, sir.
278 Q. What relation is Bert Cambridge to you?
A. A brother.
279 Q. Were you in company with those gentlemen on the 9th of August, 1894?
A. Yes, sir.
280 Q. Whereabouts?
A. Up swimming in Lincoln park.
281 Q. What time in the evening?
A. It was seven o'clock when we went up.
282 Q. What time did you get back?
A. About 8.20.
213 283 Q. Just describe that trip.
A. We were going up swimming that night and went over to the station at Rokeby and got the boys to go up swimming with the hand car, and we got the hand car and run up to this overhead bridge, and put the hand car off and went down to the U. P. railroad and went about a mile north and went swimming, and came back and put our car on at the bridge and run out over the bridge to let the train go under, and then left for town again.
284 Q. Did you cross the rails at the place on that bridge where the wreck afterwards occurred that night?
A. Yes, sir.
285 Q. In what condition was the rails, ties, and bridge?
A. So far as I know, they were all right. The hand car run over them all right.
286 Q. Any difference from the rest of the track?
A. No, sir.

ALONZO CAMBRIDGE.

Witness excused.

ERNEST TYRER, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

287 Q. Where do you live, Mr. Tyrer?
A. I am living with Mr. Lonsdale, about six miles south of town.
288 Q. Where during the summer and fall of 1894?
A. I was working with them about seven miles south of town.
289 Q. Are you acquainted with George Washington Davis, who was tried and convicted of wrecking the Rock Island train on the night of the 9th of August, 1894, about four miles south of the city of Lincoln?
A. Yes, sir.
214 290 Q. How long had you known him at the time of the wreck?

A. Why, about three months, I should judge—three or four—something like that.

291 Q. Did you see the coat that was an exhibit in the case of the State of Nebraska against George Washington Davis, tried in the fall of 1894 in the district court of Lancaster county?

A. Yes, sir.

292 Q. Did you examine that coat?

A. Yes, sir.

293 Q. You know whether or not that was his coat?

A. That was the coat.

294 Q. When had you first seen that coat?

A. Why, it was, I think—I don't know exactly. It was one Sunday I saw it first. He came out there.

295 Q. Just describe the coat.

A. It was a blue double-breasted coat, and had black buttons on with these patent fasteners, these rings.

296 Q. What was the *appearance* of those rings, if you know?

A. They were for the purpose of changing the buttons on the coat.

297 Q. Did you ever try on that coat?

A. Yes, sir.

298 Q. When was that?

A. That Sunday he was out visiting.

299 Q. How long was that before the wreck?

A. Why, just a short time; don't know exactly just how long.

300 Q. How does the coat fit you?

A. Why, it was too large.

301 Q. How many times had you seen Davis prior to August 9th, 1894?

A. Twice—that is, since he left the farm.

302 Q. Had he been working on the farm with you?

A. Yes, sir.

303 Q. For how long a time?

A. I think he started about the fifteenth of March, if I re-
215 member right.

304 Q. How long did he work on the farm?

A. About three months.

305 Q. And after he left the farm, when did you next see him?

A. I should judge it was about probably a week or a little more before the wreck.

306 Q. Did you have any conversation with him at that time?

A. No; not at that time.

307 Q. When did you next see him?

A. The next time I saw him was the night after the wreck.

308 Q. Did you have conversations with him while at Lonsdale together?

A. Yes, sir.

309 Q. You may state any of those conversations you may remember at the present time.

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial and hearsay.

A. Why, he told me one Sunday there—we was walking across one of the lots—he said he guessed farming didn't agree with him any more, and he guessed the railroad company would have to do something for him.

310 Q. How long was that before the wreck?

A. About two weeks, I guess, as near as I can remember.

ERNEST TYRER.

Witness excused.

WALTER SIDELL, being called and duly sworn as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

311 Q. Mr. Sidell, where do you live?

A. I live five miles southwest of this city.

312 Q. Where were you living on the 9th of August, 1894?

A. I lived in the same place I do now.

313 Q. Were you acquainted at that time with Mr. George Saxton?

A. Yes, sir.

216 314 Q. Where did he live with reference to your house?

A. He lived just about a straight mile northeast of that corner or a mile and a quarter around the road.

315 Q. How far is your house from the place where the wreck occurred on the Rock Island road on the night of the 9th of August, 1894?

A. About a half a mile, a little more or less.

316 Q. Were you at the wreck that night?

A. Yes, sir.

317 Q. When did you get there, early or late?

A. I got there—claim to be the first man—that is, myself and boy and a man by the name of Jack Coulture.

318 Q. How were you notified of the wreck?

A. We heard it.

319 Q. Just describe what you heard.

A. We had been threshing that day, and just got through, and was sitting in the dining-room, and we heard a train coming, and somebody made the remark, "There comes Dumpy." We used to call it "Dumpy" because it only had two coaches on, and we heard it very plain. All at once it made a terrible racket, as if running on something besides rails, and a kind of a thud, and that is the last we heard of it until steam began to occur, and then we went out on the porch.

320 Q. About what time of the night was that?

A. About 9.30, I think.

321 Q. Then what did you do?

A. Why, I looked over in that direction of that bridge and I could see fire or light under that bridge. I says to the boys, I be-

lieve that is a wreck, and somebody says, I guess not, and I says, I am almost sure of it, and we could hear voices also, and I says, Let's go over and see, and my boy says, You hadn't better go,
217 as it might be a "hold-up," and I says, I don't care, and we went over there, three of us, and we walked and run and got there just as soon as we could and examined the wreck.

322 Q. How did you go?

A. Went afoot.

323 Q. I mean in what direction did you go?

A. We went southeast a little way, about half the way, and then northeast until we struck the railroad.

324 Q. What did you go southeast for?

A. To cross Salt creek.

325 Q. Did you go up to the place where the wreck occurred?

A. Yes, sir; we jumped off the very place, you might say, within, I should say, four or five feet of the rail that was off.

326 Q. Did you notice the rail out of place?

A. I don't remember just exactly whether I did or not in the first place.

327 Q. Just tell what you did afterwards.

A. Well, after we jumped off I saw the wreck, and somebody called to us; they heard us and told us, for God's sake, to come down, that they were wrecked, and we went down to the rear coach where some of the passengers were, and Mr. Foot was standing down at the baggage car, and he called to us to come and help him get a man that was fastened in the wreck, and we went down there and he had a lantern, and I says, Is that all the lantern you got? and he says, Yes, and I says to my boy, You go home and get a lantern.

I asked him of there was a bucket to put the fire out in the engine. The coals were burning in the grate, and I saw no danger, but I thought the fire ought to be put out, because something might catch fire, and he says, No, there is no bucket; and I have a way of whistling to my neighbor, and I whistled to a man by the name of Van Brewer, on the top of the hill, so I waited a few minutes and instead of its being Van Brewer coming it was my brother and Mr. Saxton, and so we began to chop to get this man out, and we worked
218 at that; in fact we never *never* noticed the fire any more until it started, and we spent all of the time getting him out, and the fire wasn't more than eighteen inches from him when we pulled him out, then we put him on the hill where the rest of the passengers were, near the rear coach. About that time this B. & M. train came along on the B. & M. tracks and stopped and they came over and we took the passengers over, those that couldn't walk, and put them on that train. Then we came back and went out to the place where it started to run off.

328 Q. Just describe the condition of the bridge and those rails and everything at that time.

A. When I got there Mr. Saxton and Harry Foot, the brakeman, was there. I think that is all that was there when I got there, and we began to examine the track. Well, we found the spikes pulled

on the southeast side of the rail; also seen a few, I think, one or two, pulled on the north side, and one or two heads pulled off.

329 Q. On what rail was this?

A. This was on the south rail, as I call it; the southeast rail.

330 Q. And what rail with reference to the southwest end of the bridge?

A. That is where the rail was misplaced.

331 Q. The first rail that was on the southwest end of the bridge?

A. Yes, sir.

332 Q. That is the one that was misplaced?

A. Yes, sir,

333 Q. Could you tell whether the spikes had been pulled or forced out?

A. That is what they showed and that is what we all agreed.

334 Q. Just tell what you saw.

A. I se-n the spikes were pulled out, and I seen the angle bars were gone. The rail, I should judge, was between ten and twelve inches, placed over on the outside, and you could see where the flanges of the wheel had struck the ties, and we looked to see
219 whether we could see any marks on the ties of the claw-bar, which we found. Finally we began to look around for some tools, and I was with the gang, too, who picked up the bar; but I couldn't exactly tell who it was, but I think it was Mr. Saxton, the young gentleman.

335 Q. Where did he pick it up?

A. Right off the bank about fifteen feet from the place where the rail was taken off—right over the bank to the south—and we found this bar and brought it up, and also found some other pieces, and we tried this bar in the same marks, and it fit exactly, and the impression of the bar made in the ties—the impression was just as fresh as if done recently—and I seen on the other side, on the north side of the rail, a spike or two pulled and one or two of the heads pulled out, with the heads just as rare as could be.

336 Q. Did this north rail remain in place?

A. Yes, sir.

337 Q. Now, the line of indentation made by the flanges of the wheel, was they in direct line with the solid rail to the south of them?

A. I should judge for five or six ties.

338 Q. Then, what did they do?

A. Went off towards the left, towards the north.

339 Q. For how long a distance were the rails on the north side of the track in good condition?

A. I think, until about the end of the second rail only.

340 Q. Then, what did you see there?

A. The rails began, it seems to me, — lean over partly, and they pushed them out and shoved them out, and it seemed to run right off the bridge.

341 Q. What other tools, if any, were found while you were there?

A. There was a pair of pinchers, this bar, and I don't remember now if anything else, only bolts and washers.

220 342 Q. That claw-bar you saw there that night, did you see it afterwards?

A. Yes, sir.

343 Q. Where?

A. In the court-room.

344 Q. You know whose it was?

A. No; I don't.

345 Q. You know whether any one identified it or claimed it there?

A. I think it was identified by one man.

346 Q. You know who it was?

A. I think it was Shouse.

347 Q. Did you see Davis there that night—the colored man?

A. I seen a colored man, and only one, but whether it was Davis or not I don't know myself.

348 Q. Was your daughter there?

A. Yes, sir.

349 Q. You know anything about Davis being sent for down the Rock Island track to the south?

A. I didn't see him go, but seen him come back on the train.

350 Q. What, if anything, did your daughter find there that night and give to you?

A. Well, — I got home she handed me some passes—one over the B. & M., one over the Rock Island, and one over the U. P.

351 Q. Whose were they?

A. They belonged to C. H. Cherry.

352 Q. What did you do with them?

A. Brought them up to the hotel—the Tremont, I think it is—at the corner of 9th and P streets, I think it is, and he was out at the time, and I left them there with the nurse that was nursing Scott, the same nurse that was nursing Cherry—no; it was the Opelt hotel.

353 Q. Did you see those passes afterwards at the trial of the case?

A. Yes, sir.

221 354 Q. Who had them then?

A. I thin- Mr. Cherry had them; handed them to the attorneys there. I had them in my hands.

355 Q. Did you find any washers there?

A. Yes, sir; I found a washer.

356 Q. Where did you find it?

A. Right under the joint that was misplaced.

357 Q. Where the fish-plate or angle bar had been taken off?

A. Yes, sir.

358 Q. Did you see the fish-plate or angle bar found?

A. Yes, sir; I did.

359 Q. Did you see a pair of nippers found there?

A. Yes, sir; I found them myself.

360 Q. Where did you find them?

A. They laid right under the main ties on the timbers.
361 Q. How soon after the wreck occurred did you get there?
A. I don't think it was much over fifteen minutes.
362 Q. How long did you stay?
A. I stayed from the time I arrived there until two o'clock.
363 Q. When did you next go back to the wreck?
A. Went the next morning about eight o'clock.
364 Q. Was you there when the coat was found?
A. No, sir; I didn't see that.
365 Q. Was you there when the monkey-wrench was found?
A. No, sir.
366 Q. You may state whether or not you saw any spikes there that night.
A. Yes, sir; we found spikes and bolts.
367 Q. What was the appearance of the spikes and bolts?
A. Well, the bolt was unscrewed and fresh as if it was just
222 unscrewed; no rust, only a little at the end; but where the nut seemed to be fastened it was just as bright as could be.
368 Q. How about the spikes?
A. The spikes there—I couldn't say how about the spikes any more than remember whether they looked to be old spikes or just drawn out, but we found spikes just the same right there. Examined the spike-holes very closely that night.
369 Q. What was their appearance?
A. Why, the spike-holes seemed to be just the same as a hole naturally would be by a spike driven in and pulled out.
370 Q. Any dust or stain on them?
A. No; no dust; just looked as though naturally drawn out. We fitted some spikes in the same holes.
371 Q. You know what time your daughter went home?
A. No; not exactly; she left shortly—right away—after we carried the passengers over.
372 Q. Did you see Ernest Shellenberger there that night?
A. I did.
373 Q. You know who was with him?
A. No, sir.

Cross-examined by Mr. STEWART:

Not offered or introduced in evidence.

374 Q. How many spikes were pulled out?
A. I don't remember as I could tell you exactly. I should think about eight or ten; somewhere along there; I wouldn't say for certain.
375 Q. How many spikes are there used to spike down a rail?
A. I don't know that exactly. On a bridge I think they are spiked to every other tie. Now, here is a tie (indicating) and there is a tie (indicating), and this tie is spiked on the inside and that one on the outside, and I think there is something about twenty ties to the rail.
376 Q. That would be about ten spikes?

223 A. Yes—that is, on each side. There is a spike on every tie but one spike.

377 Q. And how many spikes you think had been pulled out?

A. As near as I can think, I thought that night about 8 or nine. I noticed but one spike sticking in the tie yet; about the center one on the outside.

378 Q. And how did the rail get away from that spike if it wasn't pulled?

A. I don't know that; I didn't say; but it was bent over.

379 Q. That is, the spike was?

A. Yes, sir.

380 Q. How many bent spikes did you see?

A. I believe that was the only one on the rail.

381 Q. Was the others all pulled out?

A. I don't know; wouldn't say that, because I don't know as I remember any more.

382 Q. But that is the only one you remember of seeing in?

A. Yes, sir; and it looked as though it was partly pulled and bent over.

383 Q. Did you find any of the spikes that had been pulled out that was bent?

A. No.

384 Q. Did you look for those?

A. Yes, sir; we looked all over for spikes.

385 Q. Did you find any straight ones?

A. Yes, sir.

386 Q. Whereabouts did you find those?

A. Found them right there beside of the track the rail was off.

387 Q. Did you look down under the bridge?

A. Yes, sir; I was there myself.

388 Q. Find any spikes there?

A. No, sir; didn't find any there.

389 Q. How many of those holes did you examine?

224 A. I should suppose that we examined five or six—that is, put the bar in—and how *am*ny others we looked at I don't know.

390 Q. I mean the spike-holes?

A. Oh, about the same. Examined, you might say, all of them along the rail, but I couldn't say how many spikes we had or anything of that kind.

391 Q. What kind of wood were those ties?

A. Hard oak wood.

392 Q. Are those ties still on the track?

A. No, sir; they took them off here about two months ago, I guess.

393 Q. Changed and put in others?

A. Yes, sir; they went to work under and built up and made all that bridge the same as new.

394 Q. Did the wreck of the train tear the bridge up any?

A. Why, it didn't appear to tear up very much, only just the rails.

395 Q. Knock any of the ties out of place?

A. Not that I noticed.

396 Q. Was the rails knocked out of line on both sides?

A. No, sir; the next rail after that—that is, the next one to the one that was misplaced—the wheels seemed to run against that and crowd it out like, and dished that over a good deal.

397 Q. Out, you mean?

A. Yes; for a little ways.

398 Q. You know how many spikes had been pulled out that way?

A. I didn't know any was pulled out. I looked at that the next day; they was just merely pulled out part ways and bent right over; the next rail was.

399 Q. Did you pick up those fish-bars?

A. I had them in my hand, but didn't pick them up.

400 Q. You didn't see them picked up?

A. No; there was four or five of us there together. Mr. Saxton, my son, and Harry Foot was in the crowd.

225 401 Q. How many were found there that night?

A. Two of them, I think. When I examined and found it looked as though the bar had slipped off and made a scratch.

402 Q. And that was about fifteen feet from the end of the bridge?

A. Yes; to the side down the bank.

403 Q. About fifteen feet from the track?

A. Yes, sir; right down close to the fence.

WALTER SEIDELL.

Witness excused.

WILLIAM WEENS, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

404 Q. Mr. Weens, where do you live at the present time?

A. City block, Lincoln.

405 Q. Where did you live on the 9th of August, 1894?

A. In the Webster block.

406 Q. That is Judge Holmes' block on South 11th street?

A. Yes, sir.

407 Q. Did you go to the scene of the Rock Island wreck on that night?

A. Yes, sir.

408 Q. With whom?

A. With a fellow by the name of Raymont.

409 Q. What was Raymond's business?

A. Hack-driver.

410 Q. What time did you go?

A. About half past ten or eleven o'clock when we got there.

411 Q. How did you go?

A. On a hack.

412 Q. What time did you get home?

A. We got home a little after one or about one; somewhere along there.

413 Q. Who, if anybody, came back with you?

226 A. The colored fellow came back with us.

414 Q. George Washington Davis?

A. I suppose so.

415 Q. Where did you first see him?

A. I saw him out there at the wreck.

416 Q. Whereabouts was he?

A. The first time I saw him?

417 Q. Yes.

A. At the west end of the bridge-work there along on the bank.

418 Q. Did you see him several times while you were there?

A. Yes, sir.

— Q. When, if at all, did you have any conversation with him?

A. I had a conversation with him coming home in the hack.

419 Q. How did it happen he came home with you in the hack?

A. He was coming along with a lantern and I got to talking to him while he was walking up to the hack, and I asked him how he was coming in, and he said he was going to walk, and we told him we had a hack there, and asked him if he would ride, and he said yes, and got in.

420 Q. How was the window in the hack, between the seat and the hack?

A. It was out.

421 Q. Now, just state what conversation you had with him coming in.

Mr. STEWART: The plaintiff objects as incompetent, irrelevant and immaterial, and as hearsay.

A. Well, about the first conversation I had with him was with regard to the lantern—the first thing I asked him for his lanter- to help us get out of the cornfield there, and we got to talking about the lantern, and then I found out—I think the first way it started I asked him if that was a railroad lantern, and he said it was, I think—yes—and he was on the train during the wreck when

227 the wreck happened, and then I told him I didn't think it was a railroad lantern, and he said yes, it was, and then we wanted to know why it didn't break out when the train went off the trestle.

422 Q. How did he say?

A. He said he was sitting in the seat with the brakeman and held the lantern in his hand some way when the train went off, and it didn't break, and that is the first I knew about his being in the wreck, and I asked him where he had been and he said he had been out to Kearney selling some horses for Maxey Cobb, and I called his attention to the fact that he couldn't come from Kearney to the Rock Island, and first he said he could, and then he said he walked to some town out there somewhere and got on, and he also said about having $200.00 of Maxey Cobb's money in his coat pocket, and dur-

ing the wreck he took his coat off and hung it on the steps of the coach and it burned up, money and all.

423 Q. What kind of a conversation did you have with him about their not allowing colored men to ride in the rear coach?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial and hearsay.

A. I spoke to him about it, and I said I didn't think they allowed colored men to ride in it, and he said they did, and I have forgot just what he did say.

424 Q. Did he tell you how the train did when it was wrecked; how it went from the ties or anything?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial and hearsay.

A. I don't remember whether he did or not.

425 Q. What did he say his name was?

Mr. STEWART: The plaintiff objects as incompetent, immaterial, and irrelevant and as hearsay.

A. Said his name was Washington Davis. I don't remember whether he told me his name or not that night.

228 426 Q. How far in town did he come with you?

A. He came down here to L street, L and 11th.

427 Q. Did you direct him any place after you got to town?

A. No; I think not; he knew where he was going. We stopped there and watered the horses and he got out.

428 Q. When did you next see him after that?

A. The next time in the court-house.

429 Q. After he was arrested?

A. Yes, sir.

430 Q. What did he pay you, if anything, in money?

A. Why, he gave the hackman one dollar.

431 Q. Did he have on any coat?

A. No; I think not.

432 Q. What kind of a walk did he have?

A. Had kind of a swin-ing walk; leaned forward considerably when he walked.

433 Q. What kind of pants and vest did he wear that night?

A. Had on dark-blue pants and vest.

434 Q. What kind of a shirt?

A. Kind of a light shirt; kind of a pale blue.

No cross-examination.

WM. WEEMES.

Witness excused.

WILLIAM LONSDALE, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

435 Q. Mr. Lonsdale, where do you live?

A. Why, I live south of the pen-tentiary now; I used to live on the Marquette farm.

436 Q. Where were you living on the 9th of August, 1894?

A. Five miles south, on 27th street, on the Marquette farm.

437 Q. Were you acquainted at that time with George Washington Davis?

A. I was.

438 Q. How long had you known him?

229 A. Oh, about two or three months; two months, I guess.

439 Q. How lately before the wreck had he been there at your place?

A. Why, he had been there—let me see; I think it was the Sunday before the wreck; I am not sure, but I think it was.

440 Q. How was he dressed at that time?

A. He had a blue suit on.

441 Q. New or an old suit?

A. A new.

442 Q. Anything unusual or peculiar about the suit?

A. I didn't see anything.

443 Q. What kind of buttons did he have on?

A. Had on dark buttons and fastened with rings on the inside.

444 Q. You know what he had in his pockets at that time—anything he had in his pocket?

A. Yes, sir; he had a pipe and a picture in the coat pocket.

445 Q. Do you know anything about a looking-glass?

A. Yes, sir; he had a looking-glass—round looking-glass.

446 Q. Did you ever see the pipe and looking-glass and pictures again?

A. Yes, sir.

447 Q. Where?

A. In the court-room.

448 Q. Where were they taken from at the time you saw them in the court-room?

A. From the pocket of his coat.

449 Q. That was the coat that was identified as found at the wreck?

A. Yes, sir.

450 Q. Did you see any of the boys try the coat on that time?

A. Yes, sir.

451 Q. Who?

A. Young man that worked for us by the name of Earnest Tyrer.

452 Q. How did it fit him?

A. It was too large for him.

453 Q. What, if anything, did he say at that time about the rings and the buttons on his coat?

230 Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial and as hearsay.

A. He said he had brass buttons put on and he would take them off; that he was expecting to use them after a bit.

454 Q. When was he going to put the brass buttons on?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial and as hearsay.

A. Why, he didn't say.

455 Q. Did he ever work for you?

A. Yes, sir.

456 Q. For how long a time?

A. He worked for about two months, I guess.

457 Q. What sort — walk or ga-te did he have?

A. Why, as if lame, as if his feet were sore; sort of shambling walk; didn't walk as if he was all right.

WILLIAM LONSDALE.

Witness excused.

FRED LONSDALE, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

458 Q. Mr. Lonsdale, where do you live?

A. Six miles south.

459 Q. What is your business?

A. Farming.

460 Q. Where did you live on the 9th of August, 1894, and for several months prior thereto?

A. Six miles south, on the farm known as the Marquette farm.

461 Q. Earnest Tyrer lived there with you, too?

A. Yes, sir.

462 Q. And your brother William?

A. Yes, sir.

463 Q. Were you acquainted with George Washington Davis?

A. Yes, sir.

464 Q. Were you present at the time he was arrested?

231 A. Yes, sir.

465 Q. When had you last seen him before the wreck?

A. Sunday evening before the wreck.

466 Q. Was that the evening he came with the new coat on?

A. No, sir.

467 Q. When did he come with the new coat on?

A. Either Wednesday or Thursday before.

468 Q. What did he have to say at that time about the coat?

A. I made the remark to him about his being so well dressed and everything when he was out of work, and he came around close to where I was sitting and I took hold of it and felt it, and I made a remark, and I turned the coat over and there were rings on the buttons, and I asked the reason of that, and he said it was to put brass buttons on when he got a job on the train.

469 Q. Who was present at that time?

A. William Lonsdale, Earnest Tyrerer, and, I believe, Jess. Enslow.

470 Q. How about Ed. Craighead?

A. He was there, too.

471 Q. After the wreck, when did you next see Davis?

A. The next evening.

472 Q. About what time?

A. I think about seven o'clock.

473 Q. Where?

A. At our place, the Marquette farm.

474 Q. Just describe what he did and said when you saw him there.

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial.

A. Why, I knew he was coming before he got there. I was out to the blacksmith shed. We have a gate there to go into the barnyard, and he came up to me and we passed the time of day, and I said it was hot, and he said it wasn't as hot as it was down at the wreck last night, or something like that.

475 Q. Well, what next?

232 Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial.

A. Then he spoke—I asked him, Was you at the wreck? or something like that, and he said, Yes. He said he had got on the train at Rokeby and was sitting in the hind seat with Harry Foot; don't know whether he said Harry Foot or not, but the brakeman, and he threw his head out of the window and seen the engineer and fireman throw their arms around each other and went over.

476 Q. What did he say, if anything, about in what way the wreck was caused?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial.

A. We walked on across the corral, and Mr. Enslow just came then with his wagon and we commenced talking about the wreck, and he said that the bolts had been taken off some way and a part unscrewed under the rail, and he took his hands and showed like this (indicating), and showed how a bar was put under the rail and pryed over, and then we went from there up to the porch of the house and sat there, and was there talking about the wreck. He talked about the engineers getting too damned smart and woul-n't stop; that they were afraid of a hold-up.

477 Q. Did he have on any coat?

A. No, sir.

478 Q. What, if anything, did he say about his coat?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial.

A. When he was leaving the place my brother asked him where was his coat and he said, "I left it in town."

479 Q. What, if anything, did he say he done with the lantern?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial.

233 A. I don't remember anything about the lantern now.

480 Q. Did he tell you anything else about the manner in which he found out about the wreck?

A. I heard him tell Jim Malone that he was in the Colored Club room, or on the steps of the Colored Club room, and heard the crash and went out.

481 Q. How did you know he was coming that night to your place?

A. My brother, William Lonsdale, and Earnest Tyrer had drove about forty rods from the house, and they seen him coming, and they drove back and told me he was coming.

482 Q. When did you first hear of the wreck?

A. About two o'clock in the morning, the same evening of the wreck.

483 Q. Who told you about it?

A. Saxton.

484 Q. George Saxton?

A. Yes, sir; and his son.

485 Q. What sort of a *gate* or walk did Davis have?

A. Sort of rolled when he walked.

486 Q. How was he dressed when he came to your place the night after the wreck?

A. He had a blue pants and blue vest and some kind of a colored shirt on, and, I believe, a brown soft hat.

FRED LONSDALE.

Witness excused.

The further taking of these depositions was here adjourned until October 23, 1896.

LINCOLN, NEBRASKA, *October 23rd*, 1896.

O. B. RAMEY, being first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, to wit:

Examined by R. J. GREENE, on behalf of the defendant:

487 Q. What is your business?

A. Agent for the Pacific and United States Express Company.

234 488 Q. And what was your business on the 9th and 10th of August, 1894?

A. Same.

489 Q. And what was and is your place of residence?

A. City of Lincoln, Nebraska.

490 Q. You may state whether or not you visited the scene of the Rock Island wreck on the 9th day of August, 1894.

A. I did.

491 Q. Who went with you?

A. Mr. W. G. Roberts and Dr. Crim.

492 Q. Did you make an examination of the bridge, the track, and the ties and rails and fastenings at the place where the wreck occurred?

A. Yes, sir; we went out on the top of the bridge with that intention.

493 Q. You may state what you saw in your examination.

A. Well, at the south end of the bridge, as if coming onto the trestle-work at the south rail—showed that it had been removed, and that the wheels of the locomotive run squarely off the end of the rail, striking the ties in a direct line from the end of the rail, showing that the rail must have been removed from there when the wheels reached that point.

Mr. Stewart objects on behalf of the plaintiff to the statement as to saying that it must have been done, for the reason that it is but a conclusion of the witness and isn't a statement of any fact, and moves to strike out the answer of the witness for that reason.

494 Q. With reference to the southwest end of the bridge of trestle-work, what rail is it that you speak of as being removed?

A. The south rail, coming onto the bridge from the southwest, the track running towards the northeast. It would be the south rail, or the one on you- right.

495 Q. The rail that laid immediately south of this—how far did it run onto the bridge, if you remember?

235 A. To the fourth tie.

496 Q. What, if anything, did you observe as to the spikes on the south side of this rail that was misplaced?

A. They had been drawn. The imprints of a claw-bar was right behind the hole in the tie where the spikes had been drawn straight out of the ties, not bent over by force or anything of that kind.

497 Q. Now, these spike-holes that you testified to, what was their condition—that is, as to being fresh or rusty?

A. We particularly noticed that they were fresh.

498 Q. Did you examine any of the spikes at that place?

A. No; the spikes had been scattered around there. There were none of the spikes around there, I think, on the south side at the time we were there.

499 Q. State whether or not you found any angle bar at the joint formed by this misplaced rail and the one next south of it.

A. No; none there, but some on the trestle-work, but none at the place where the rails had been disconnected.

500 Q. The rail that was south of the misplaced rail was unfastened and apart from the rail you designate as the misplaced rail?

A. Yes, sir.

501 Q. Did you examine the spikes on the north side of this misplaced rail?

A. Yes, sir.

502 Q. In what condition were they?

A. Commencing, I think, on the sixth tie, there was a spike

pulled, and on the seventh. On the eight- there was a spike remaining in the tie, but it had been stripped; it was still fresh; the claw-bar had scraped off the head of it, but had not removed the spike. It still remained there.

503 Q. In what condition were the other spikes on the north side of this rail—that is, did they stand up above the ties or were they down in the tie?

236 A. No; they were drawn out on the north side until you got up pretty close to the end of the rail, and then they were tipped over.

504 Q. Did you make any examination of the north rail?

A. This was the north rail I was speaking of.

505 Q. What was the condition of the spikes on the north side of this south rail which you designate as the misplaced rail?

A. Well, those spikes were gone down close to the end of the rail, but there was a bolt coming from the sixth tie, fastening the tie to the frame of the bridge where the flange of the engine had hit squarely on top, sinking the top into the wood and just leaving a mark and passed on to the next tie and struck that with full force on the next tie, making a mark from the rail right straight forward where the rail should be left.

506 Q. Now, with reference to the marks you have testified to appearing to have been made by the flanges of the wheels immediately in the place where the misplaced rail should have been, you may state whether or not they were in a direct line with the rail in place lying immediately south.

A. They were.

507 Q. Did you make any examination of the companion rail to this rail on the north?

A. Yes, sir; and I said the spikes were removed commencing at the 6th tie on the north side of that rail, then coming up to the 8th tie the spike still remained in it, showing it had been clinched with a claw-bar and just stripped at the side of the head.

508 Q. State whether or not this north rail was still in place and in line with the other rails on the bridge.

A. It was still in place, but hardly in line; it had been pressed out, the spikes being removed from the north side.

509 Q. Was it pressed out of line at the north or south end of the rail?

237 A. At the north end of the rail.

510 Q. How long were those rails, if you know?

A. About 28 feet, I guess.

511 Q. You have already described the condition of things with reference to the misplaced rail and its companion rail on the north. What was the condition of the track from that point on toward the north?

A. You mean in regard to the south or the north side?

512 Q. Take both sides, the south side first.

A. On the south side the wheel came in contact with the misplaced rail and crowded hard against it until it pushed it over, and the wheel passed over the corner of that rail right at the joint with

it and the rail further north, and they were in sort of a "V" shape where it crossed over the end, and from that point the marks bore off towards the north. It seemed to have changed the course of the engine by running off the ends of these rails.

513 Q. Do you remember on what tie this spike was you testified it was stripped?

A. The 8th tie.

514 Q. Did you ever see that tie again afterwards?

A. Yes, sir; I did.

515 Q. Whereabouts?

A. At the coroner's inquest.

516 Q. And did you identify that as the tie and spike?

A. Yes, sir.

Cross-examination.

Examined by Mr. STEWART:

Not offered nor admitted in evidence.

517 Q. How many spikes had there been on each side of this iron misplaced rail?

A. I didn't make any examination or count of that. I couldn't tell you.

238 518 Q. How many had been drawn?

A. On which rail?

519 Q. On the iron misplaced rail.

A. I can't tell you the number, but they were all withdrawn on the south side of the rail.

520 Q. All of them?

A. To within, I should think, two or three of the end of the rail.

521 Q. Two or three ties of the end of the rail?

A. Yes, sir.

522 Q. And how many on the north side of the rail?

A. I couldn't say how many on the north side of the rail.

523 Q. About how many were remaining?

A. I didn't make any memorandum of that.

524 Q. Did you make any memorandum of how many were taken out on the north side?

A. No, sir.

525 Q. Was there any taken out?

A. Yes; the one back next to the rail that remained in position were taken out.

526 Q. Would you say half were taken out?

A. I wouldn't say, but there was some taken out on the north side of the rail.

527 Q. Can you give any idea of how many?

A. I might make a guess.

528 Q. I don't want you to guess; I want to know if you know anything about it.

A. I don't know anything for sure.

529 Q. You didn't see those spikes pulled out?

A. No, sir.

530 Q. Don't know who pulled them out?

A. No, sir.

531 Q. Nor when they were pulled out?

A. No, sir.

239 532 Q. You simply saw the holes where, apparently, had been spikes?

A. Yes; there had been spikes there.

533 Q. And how many spikes had been pulled from the north rail?

A. I think the spikes were pulled up to the—possibly as far as the 16th or 17th tie from the end of the bridge; not counting from the end of the rail that remained intact, but from the end of the bridge.

534 Q. How many ties from the rail that remained intact to the south end of the bridge?

A. There were four.

535 Q. Then the spikes had been pulled out from about how many ties along the north rail?

A. The north rail, commencing on the 6th. The rail didn't end even on the ties. The rail on the south side stopped on the 4th tie, but the one on the north side stopped possibly on the 5th tie.

536 Q. Then the spikes had been drawn from some ten or a dozen ties north of that yet?

A. Yes, sir.

537 Q. Any removed on the inside of that rail?

A. No, sir.

538 Q. Were any of them pulled out by the misplacement of the track?

A. Yes; farther up towards the north end of the rail the rail had been moved to the north and mashed over the spikes and sunk down into the wood.

539 Q. That rail had been pressed out, had it?

A. Yes, sir.

540 Q. And which way had the south rail been pressed?

A. It didn't appear to have been pressed at all.

541 Q. Was it right in place?

240 A. No; it wasn't there at all when the engine wheel came to the end of the rail.

542 Q. Of course, you wasn't there and you don't know that?

A. Oh, no; I wasn't there. The rail was lying, when I seen it, about six inches out at the last tie at the southwest end.

543 Q. And how much out of line at the north end?

A. Well, it ran across the end. It doubled together where the engine run over the corner of it. It lay in, if anything, perhaps a couple or three inches, just as if the two had come together and doubled together.

544 Q. How many spikes you say on the north end of that south rail were left?

A. I didn't say. I didn't make any memorandum of that.

545 Q. Didn't you consider that a matter of some importance?

A. No; I was thoroughly convinced those spikes had been drawn.

546 Q. And you simply thought it was only important to see what spikes were out?

A. I thought it was important to see if that rail had been misplaced or taken away from there.

547 Q. Were those spikes that hadn't been drawn on this south rail—any of them pulled partially out?

A. I didn't notice that they were on the south rail.

548 Q. Did you notice that they were any?

A. No; I didn't examine that. The spike-holes that we examined on the south rail were simply the holes; the spikes wasn't there.

549 Q. You didn't think it was a matter of importance to see whether the spikes were twisted or pulled out?

A. I would have noticed it if there were.

550 Q. You didn't notice whether any of the spikes were partly out?

A. The spikes were up close to the end of the rail and were removed far enough so the rail could be lifted right out.

241 551 Q. How do you know if you don't know how many spikes were left?

A. The rail was left that way.

552 Q. But you don't know whether the spikes on the north end had been lifted or not?

A. They were not there at the time.

553 Q. At the time you saw it?

A. Yes. They wasn't there when the engine left, because she left her marks.

554 Q. You wasn't there, was you?

A. No; but that left an impression afterwards.

555 Q. Which car of that wrecked train left the track first?

A. The engine left the track first.

556 Q. How do you know?

A. Why, the engine runs ahead of the cars and it was going north.

557 Q. But what I want to know, if there was anything there to indicate what wheel of what car first struck the ties.

A. The marks on the south side were all in one line. The engine's marks were, of course, the deepest, or rather the others followed right in it on the south side, and there was every indication that showed simply that the engine struck the ties first and the others followed right along.

558 Q. Now, the marks from the engine wheels—you couldn't distinguish those from the impression of the wheels of the other cars?

A. Yes; they would make a deeper imprint in the wood.

559 Q. All made in the same place, were they not?

A. Followed right along on the south side in a line as near as you could draw it.

560 Q. Could you tell from looking at those marks that it hadn't been simply the wheels of the two rear coaches that made the imprints or whether every wheel struck there?

A. Yes; every wheel struck there.

561 Q. How could you tell that?

242 A. On the north side, where the coaches got off later, you could see they didn't follow right in line. The rail crowded out there and didn't let the engine in onto the ties as soon as the coach wheels struck it.

562 Q. As a matter of fact, the indications are that the engine didn't strike the rail until after the coaches struck it?

A. On the north side, but on the south side they did.

563 Q. Let us suppose that the engine didn't leave these rails until after they got past the misplaced rail, and then it and the coach both slid off at the same time and run on straight over; what different marks would it make?

A. Well, then, the marks at the end of the rail on the south side would have resembled the marks where the coaches first struck on the north side, but they didn't do that at all; they were deeply imprinted right from the start on the south side.

564 Q. Now, if all the wheels on the two coaches had struck these ties right at the end of the rail which was not misplaced, wouldn't that make a deep imprint?

A. It might, but not so deep as the engine.

565 Q Why not; did you ever see a wreck before?

A. Yes, sir. Because the engine has much more weight to it and the flange on an engine wheel is made much more sharp.

566 Q. In other words, you arrive at the conclusion that the engine went off at the end of this rail that you speak of simply because you think the cars couldn't have made as deep an imprint in the ties as was found there?

A. Yes; I think she went off the end of the rail and the coaches left after.

567 Q. For the reason, as I understand you, that the imprint in the ties was deeper than the wheels of the coaches would have made?

A. Yes, sir; that is one of the reasons.

243 568 Q. Have you any other reason?

A. Yes; that everything showed that there was no rail to run on, and the engine hunts the ties immediately when there is no rail to run on.

569 Q. But the coach will hunt the tie also when there is nothing to run on?

A. Yes, sir; but the engine runs ahead and it strikes it first. If that had been the condition the marks would not have been in line with the track south of the bridge. The rail would have moved with the engine out of line whichever way the rail gave. The engine would have stayed on the rail until upset, and then would have gone on the ties right where it upset.

570 Q. So, then, if the engine had been tipped over by the wheels of the tender, then the wheels of the coaches would have jumped right off the end of the rail which wasn't misplaced and made marks in a direct line as you indicated?

A. No; they would if they had followed the engine. It might not go directly, but would bear off from the track.

571 Q. Haven't you already testified that they did bear off?

A. No, sir; not until after the engine came to the end of that rail where it run over the end of the joint and the cars and the whole thing started north.

572 Q. Do you say the engine run over the misplaced rail?

A. Yes; from the end of it; it had every indication of it from the north end of it.

573 Q. That is, the engine wheels or the wheels of some car dropped inside of that south rail, did they?

A. They run right where the rail had been; that would be inside.

A. Inside of where it was lying or should have been.

574 Q. That is, the rail was pressed out to the side?

A. No; it wasn't pressed out.

575 Q. Well, it was out to the south?

A. Yes, sir.

244 576 Q. And the wheels of some cars of that train made marks right where the rails should have been left?

A. Yes, sir.

Redirect.

Examined by Mr. R. J. GREENE, on behalf of the defendant:

577 Q. A railway track is of a fixed gauge, is it not; the rails always the same distance apart?

A. Yes, sir.

578 Q. Now, in answer to Mr. Stewart'- question, you testified that you knew the engine had passed off immediately onto the ties at the place where the misplaced rail should have been if the track had been in good condition at the time the train passed over it, and you could tell that from the indentations there from the flanges of the engine wheels. Now state what is the distinction between the i-dentation made from the flange of the engine wheel and the i-dentation made from the flange of an ordinary car wheel.

Mr. Stewart, on behalf of the plaintiff, objects to the question as having been already answered and not proper redirect examination.

A. The i-dentation was heavier or deeper from an engine wheel than it was from a car wheel.

579 Q. Now, if, as stated by Mr. Stewart in his examination, the rail at the place of the misplaced rail had been in place when the engine passed over it, but had crowded out and the wheels of the cars had fallen on the ties, you may state whether or not there would have been any indentations at that point at all of the engine wheels.

A. There would not, and it would be in a direct line if she had given away.

580 Q. Now, you have testified that the rails are the same distance apart on a railway track. If a rail on the south side had been crowded out and had allowed the wheels of the coaches

245 to fall on the ties, you may state whether or not the wheels on the north rail would have also left the rail at the place they did on the south side.

Mr. Stewart, on behalf of the plaintiff, objects as incompetent, immaterial, and irrelevant, and as not proper redirect examination.

A. They would if they had been crowded off so as to leave the line. They would go off that way altogether.

581 Q. At the same time?

A. Yes, sir.

Recross-examination.

Examined by Mr. STEWART, on behalf of plaintiff:

582 Q. That is, you mean that it would be a physical impossibility for the rail to slip out from under the wheel and let the wheel drop down directly?

A. That is what it would be, an utter impossibility with the engine on the track.

583 Q. If an engine were off the track would it be—suppose the engine was on ahead on another rail?

A. Well, if it slipped over with the cars——

584 Q. Suppose the rail had slipped inside of the car?

A. The wheels would follow the rail if they were on that rail when it slipped.

585 Q. Would it be impossible for the rail to simply slide out from under the wheels instead of the cars moving off from the rail?

A. No.

586 Q. Think it would not?

A. With the weight on it, it would just separate, and it would be so heavy that it would stick to it.

587 Q. At what point did you say that the first marks were found on the ties on the north side?

246 A. Well, it was not found until three or four ties further down. I didn't make a memorandum of that, but it didn't leave the north rail for, perhaps, four or five ties as soon as it did on the south.

588 Q. Can you state where the first indentation of any wheel was found on the north side?

A. No, sir; I wouldn't state that. I didn't make a memorandum of that.

589 Q. You didn't make any examination of that?

A. Yes; we noticed that, but it didn't leave it at the same time.

590 Q. But how much of a difference you are not prepared to say?

A. No, sir.

591 Q. Did you make a memorandum of these appearances and circumstances?

A. I did at the time.

592 Q. And those things you made no memorandum of you can't recall at this time?

A. No; not to be definite, no.

593 Q. Now, your testimony you have given here this afternoon is in accordance with the memorandum you made at that time?

A. I think it is.

594 Q. And it is from that memorandum you are giving your testimony?

A. Well, I turned the diagram in on one former occasion with my evidence, but these facts I made a memorandum of. I went afterwards and they are clear in my mind, just as they were then.

595 Q. You know what the reason is you didn't make a memorandum as to where the ties showed the wheels first struck the ties on the north side?

A. It was evidence to me; it did not seem necessary.

596 Q. And so you didn't make it?

A. I simply noticed it left the north track after it did on the south track.

597 Q. Your impression is now, it was how far?

247 A. I should say not until four ties further up the track than where the other wheels left.

598 Q. When was it you made this examination, how long after the wreck?

A. Well, it was in the forenoon.

599 Q. Of the day following?

A. Yes, sir.

Redirect examination.

Examined by R. J. GREENE, in behalf of the plaintiff:

600 Q. The facts you testified to are facts you ascertained at that time?

A. Yes, sir.

601 Q. You have testified to these matters before?

A. Yes, sir.

602 Q. You made a written report of the conditions you found at the wreck and as to your opinion as to the cause of the wreck to the companies for which you were working at that time, did you not?

A. I didn't make the written statement to the company. I made the memorandum, took a pencil and made a little diagram of this, the condition I found on the ties and the way the rails were misplaced, and made a memorandum as to which tie the rail was removed from, etc., and that is what I made my evidence from.

603 Q. Now, that diagram you testified to was put in evidence in the Davis case?

A. Yes, sir.

604 Q. And you hav-n't that diagram with you?

A. No, sir.

Cross-examination not introduced in evidence.

Examined by Mr. STEWART, on behalf of plaintiff:

605 Q. Are you still working for the company?

A. No, sir.

248 Redirect.

Examined by Mr. R. J. GREENE:

606 Q. What is your business?

A. Agent for the Pacific and United States Express Company.

607 Q. You are not and have not been in the employ of the Chicago, Rock Island and *the* Pacific Railway Company?

A. No, sir; never.

Recross-examination, examined by Mr. Stewart, on behalf of the plaintiff, not introduced in evidence.

608 Q. Were those express companies using the Rock Island road at that time?

A. The United States was on the Rock Island.

609 Q. And they were interested in the matter of the wreck at that time?

A. Nothing, only our messenger's safe, was in there, and I went out to look after it.

610 Q. That was burned up?

A. Yes, sir.

611 Q. With some express packages?

A. Yes, sir.

612 Q. Well, in that way the company was interested, then, to know how the wreck occurred?

A. Yes; but we are not responsible for that outside of the railroad. The railroad company had a package of money of ten dollars in there, which we immediately remunerated them for.

Witness excused.

A. E. RAMSEY.

Mrs. NETTIE COLLIER, of lawful age, being first duly examined, cautioned, and solemnly sworn, as hereinafter certified to, deposeth and sayeth as follows, viz:

Examined by R. J. GREENE, on behalf of the defendant:

249 613 Q. Mrs. Collier, where do you live at the present time, what city and country?

A. Lincoln, Nebraska.

614 Q. Where were you living in August, 1894?

A. In Lincoln.

615 Q. Where were you on the 9th day of August, 1894?

A. In the Rock Island wreck; the Rock Island train, I believe.

616 Q. Were you a passenger on the train that was wrecked a few miles south and east of Lincoln on the night of the 9th day of August, 1894?

A. I most assuredly was.

617 Q. How soon after the train was wrecked was it before you was out of the wreck on the ground?

A. I couldn't say as to that; it wasn't very long.

618 Q. Just a few minutes?

A. A few minutes, I should judge.

619 Q. Who did you see?
A. Well, I seen a good many, but couldn't call their names, there at the time. I remember the Seidells.
620 Q. Who was with you?
A. My sister-in-law.
621 Q. What colored man did you see?
A. I seen just one.
622 Q. Who was that?
A. That was Davis, I should judge.
623 Q. How soon was that after you got out of the train?
A. Well, it was a few minutes after I was taken out that I seen him on the hill.
624 Q. By a few minutes you mean a very few minutes?
A. I couldn't say just how long.
625 Q. With reference to the time you saw other people, did you see him first or the others first?
A. Well, there was so many got out of the car and I was pretty excited. I should judge I seen him about as quick as I seen
250 any of them.
626 Q. Did you see him have any conversation with any one?
A. The first time I seen him was when my sister-in-law had her hands on his shoulder and requested him to go down and help the sufferers, and what made me notice it was she had her hands on his shoulders, and then she asked him to go down and help the sufferers, and that was when I seen the colored man.
627 Q. What did your sister-in-law say to him?
A. She asked him to go down for God's sake and help those suffering.
628 Q. What did he do?
A. Gave a peculiar yell and went down to the train.
629 Q. What is your sister-in-law's name?
A. Mrs. Rutherford.
630 Q. Was she on the train with you?
A. Yes, sir.
631 Q. You remember the names of any others on the train?
A. Col. Bills was one, and there were others, but I don't remember their names.
632 Q. The brakeman, do you remember his name?
A. Yes, sir; Mr. Foote.

Cross-examination not introduced in evidence.

Examined by Mr. STEWART:

633 Q. Where did you get on that day?
A. Topeka, Kansas.
634 Q. Were there many in the coach you were in?
A. Well, not very many. There — three ladies of us.
635 Q. And about how many gentlemen?
A. Well, I couldn't say positively.
636 Q. Well, as near as you can remember.

251 A. Well, I see Mr. Bills and some gentlemen with him, and that German woman and her husband and child, and Mr. Foot and some gentlemen Mr. Foot was talking to across the way.

637 Q. What town did the train stop at just prior to the wreck?
A. I couldn't say.
638 Q. You remember of its stopping anywhere along there?
A. No, sir; I don't remember.
639 Q. You know anybody that was in the front coach?
A. No, sir; I do not.
640 Q. Didn't see anybody go in there?
A. I did not, only the conductor.

MRS. NETTIE COLLIER.

Witness excused.

Certificate.

STATE OF NEBRASKA, } ss:
Lancaster County, }

I, P. F. Greene, a notary public in and for Lancaster county, State of Nebraska, duly commissioned and qualified, do hereby certify that William Lonsdale, O. B. Ramey, Lewis Ryan, Fred Foster, Bert Cambridge, Lettie Seidell, Walter Seidell, Ernest Shellenberger, Wm. Weemes, Fred Lonsdale, Lon. Cambridge, and Mrs. Nellie Collier were by me first severally duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed, as above set forth, were taken down in shorthand by Victor Seymour, stenographer, subsequently extended in longhand, and respectively subscribed by the said witnesses in my presence, and were taken October 21, 22, and 23, 1896, at the office of L. W. Billingsley and R. J. Greene, at 210 South 11th street, in the city of Lincoln, county of Lancaster and State of Nebraska, the time and place in the annexed notice specified, and that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit, and that said depositions were commenced
252 October 21, 1896, the time in said notice specified.

In testimony whereof I have hereunto set my hand and notarial seal, at Lincoln, Nebraska, this November 7th, 1896.

[SEAL.]

P. F. GREENE.
Notary Public.

Costs.

Swearing witnesses	$1.50
Issuing 3 subpœnas for 18 witnesses	1.50
205 folios	41.00
1 certificate	.25
Postage	
Serving subpœnas for 18 wit	9.00
Mileage	3.10
	56.35

Copy of Exhibit 1.

Letters of administration.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

In the County Court.

To all to whom these presents shall come, Greeting:

Know ye that whereas Ernest H. Zernecke, late of the county of Lancaster and State of Nebraska, died intestate on or about the ninth day of August, A. D. 1894, at Lincoln, in said county, having at the time of his decease personal property and effects in this State, to the end, therefore, that said property and debts may be collected, preserved, administered, and distributed according to law, Bertha M. Zernecke was, and she is hereby, appointed administratrix of all and singular of the goods, chattels, rights, credits, and effects which were of the said Ernest H. Zernecke's estate at the time of his decease, with full power and authority to secure and collect the said property and debts, wheresoever the same may be found in this State, and in general to do and perform all other acts which now are or hereafter may be required of *him* by law.

253 In witness whereof I have hereunto set my hand and affixed the seal of said county court, at my office, in Lincoln, this 10th day of November, 1894.

I. W. LANSING,
County Judge.

[SEAL.]

Attached to Exhibit 1 was the following:

LANCASTER COUNTY, ss:

In the County Court of Lancaster County, Nebraska.

I certify that the annexed instrument is a complete and correct copy of the letters of administration issued by said court to Bertha M. Zernecke in the matter of the estate of Ernest H. Zernecke, deceased, as appears from the original file in this court, and that the same are now in force.

Witness my hand and seal of said court this 14th day of November, A. D. 1896.

[SEAL.]

S. T. ACHNAN,
County Judge of Lancaster County, Nebraska.

The above and foregoing is all the evidence offered and all the evidence introduced in the trial of said cause.

In the District Court of Thayer County, Nebraska.

BERTHA M. ZERNECKE, Administratrix, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

And the defendant in the above-entitled cause, in the district court of Thayer county, seventh judicial district of Nebraska, having within the time heretofore allowed by the court for that purpose reduced to writing in its bill of exceptions all the testimony
254 and evidence adduced or offered on both sides of the before-named cause in the before-named court, all of the objections with the grounds therefor made to the admission of testimony, all of the rulings of the court on such objections, and all of the exceptions to such rulings made and taken at the time, and having served the same on the attorney for the above-named plaintiff according to law for examination and amendment, and the same being now before me, the undersigned judge, before whom said cause was tried, the amendments suggested by plaintiff being agreed to by defendant on the motion of the attorneys for the defendant that the same may be settled, allowed, signed, sealed, and made a part of the record in the said cause in the said court:

Now I, the said judge, do hereby certify that this bill of exceptions contains all the testimony and evidence adduced or offered by the plaintiff and defendant on the trial of said cause, all of the objections to the admission of testimony, all of the rulings of the court on such objections, and all of the exceptions taken to such rulings at the time; and I do hereby order that it be made a part of the record in the said cause in the said court, which is accordingly done.

Done at Hebron, Nebraska, this 4th day of January, 1897.

W. G. HASTINGS,
Judge of the District Court.

I, G. W. Wasson, clerk of the district court of Thayer county, in the seventh judicial district of Nebraska, do hereby certify that this is the original bill of exceptions filed in the office of said clerk in said cause.

In testimony whereof I hereunto set my hand and affix the official seal of said court this 8th day of January, 1897.

[SEAL.]

G. W. WASSON,
Clerk of the District Court.

I hereby certify that this transcript contains all of the evidence adduced or offered on the hearing of the above cause at the No-
255 vember term, 1896, of the district court of Thayer county, Nebraska.

———,
Official Reporter.

Endorsed: 9149. Chicago, R. I. & P. Co. *vs.* Bertha Zernecke, adm'x. Bill of exceptions. Supreme court of Nebraska, April 16th, 1897. D. A. Campbell, clerk.

And afterwards, to wit, the 15th day of January, 1898, there was filed in the office of the clerk of said court a motion to file briefs, notice, and stipulation in words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
BERTHA ZERNECKE, Administratrix of the Estate of E. H. Zernecke, Deceased, Defendant in Error.

Comes now the plaintiff in error and moves the court that the time for filing briefs and serving briefs herein be extended until October 1, 1898, as per agreement of counsel.

W. F. EVANS,
L. W. BILLINGSLEY, AND
R. J. GREENE,
Attorneys for Plaintiff in Error.

To Bertha Zernecke, administratrix of the estate of E. H. Zernecke, deceased, defendant in error, and Stewart & Munger, her attorneys:

You are hereby notified that on February 15th, 1898, or as soon thereafter as counsel can be heard, plaintiff in error will present the above motion to the supreme court and ask that it be sustained.

256

W. F. EVANS,
L. W. BILLINGSLEY, &
R. J. GREENE,
Attorneys for Plaintiff in Error.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that the time for serving and filing briefs of plaintiff in error herein be extended until October 1, 1898, and that defendant in error have twenty days from the date of service of the brief of plaintiff in error in which to serve and file briefs:

Provided that *in* the above case shall be advanced or set for hearing before January 1, 1899, then plaintiff's in error brief to be served 90 days prior to the time of hearing.

W. F. EVANS,
L. W. BILLINGSLEY, &
R. J. GREENE,
Attorneys for Plaintiff in Error.
STEWART & MUNGER,
Attorneys for Defendant in Error.

Rec'd copy of the above notice Jan. 10, 1897.

STEWART AND MUNGER.

Endorsed: 9149. Chicago, R. I. & P. Co. *vs.* Zernecke. Motion & —. Supreme court of Nebraska. Filed January 15, 1898. D. A. Campbell, clerk.

And afterward, to wit, on the 19th day of January, 1898, the following order was made by said court and entered of record, to wit:

THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company *vs.* BERTHA ZERNECKE, Adm'x, etc. } Error from the District Court of Thayer County. No. 9149.

257 Upon motion of the plaintiff in error, leave is hereby given it to serve and file its briefs herein on or before October 1, 1898.

And afterward, to wit, the 12th day of January, 1899, there was filed in the office of the clerk of said court a motion and notice in words and figures following, to wit:

In the Supreme Court of Nebraska.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, *vs.* BERTHA ZERNECKE, Administratrix, etc., Defendant in Error.

Comes now the defendant in error and moves the court to dismiss the proceedings in error herein, for the reason that the plaintiff in error has failed to serve and file briefs in accordance with the provisions of rule No. 9 of this court.

STEWART & MUNGER,
Attorneys for Defendant in Error.

To L. W. Billingsley and R. J. Greene, attorneys for plaintiff in error:

You are hereby notified that we have filed a motion in the supreme court, of which the above is a true copy, and will submit the same to the said court at the opening of such court on the 17th day of January, 1899, or as soon thereafter as counsel can be heard.

STEWART & MUNGER,
Attorneys for Defendant in Error.

Received a copy of the above notice and motion this 12th day of January, 1899.

L. W. BILLINGSLEY AND
R. J. GREENE,
Attorneys for Plaintiff in Error.

258 Endorsed: 9149. Rock Island *vs.* Zernecke, adm'x. Motion to dismiss and notice. Supreme court of Nebraska. Filed January 12, 1899. D. A. Campbell, clerk.

And afterward, to wit, on the 17th day of January, 1899, the following order was made by said court and entered of record, to wit:

THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company, Plaintiff in Error, *vs.* BERTHA ZERNECKE, Adm'x, etc., Defendant in Error. } Error from the District Court of Thayer County. No. 9149.

Upon motion of the defendant in error, it is by the court ordered that the plaintiff in error serve and file briefs herein within fifteen days from this date.

And afterward, on the 7th day of March, 1900, the following judgment was rendered by said court and entered of record, to wit:

THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company, Plaintiff in Error, *vs.* BERTHA ZERNECKE, Administratrix of the Estate of Ernest H. Zernecke, Deceased, Defendant in Error. } Error from the District Court of Thayer County. No. 9149. Judgment of Affirmance.

This cause came on to be heard, was taken up and argued by counsel; on consideration whereof the court finds there is no error apparent on the record in the proceedings and judgment of the district court. It is therefore considered by the court that said
259 judgment be, and the same hereby is, affirmed, and that the defendant in error recover of the plaintiff in error her costs, taxed at $—, and that a mandate issue accordingly.

And on the same day, to wit, the 7th day of March, 1900, there was filed in the office of the clerk of said court a certain opinion in words and figures following, to wit:

260 *Opinion. Filed March 7th*, 1900.

CHICAGO, R. I. & P. RAILWAY CO. *vs.* BERTHA ZERNECKE, Adm'x, etc. } No. 9149.

1. By sec. 3, art. 1, chap. 72, Compiled Statutes, right of action is given to a person for all injuries sustained while a passenger of a railroad company, except where the injury was occasioned by his own criminal negligence or by his violation of some express rule or regulation of the carrier actually brought to his notice.

2. In an action for injuries sustained by derailment of train on which plaintiff was a passenger the statute creates a presumption

that the accident was caused by the negligence of the carrier or by its wrongful act, neglect, or default.

3. That sec. 3, art. 1, chap. 72, Compiled Statutes, making carriers liable in absence of negligence for injuries to passengers, is within the police power of the State.

4. Chap. 21, Compiled Statutes, is not amendatory of section 3, article 1, chap. 72, Compiled Statutes, nor do the two acts in anywise conflict one with the other.

5. Under chapter 21, Compiled Statutes, known as "Lord Campbell's act," a right of action is given the legal representative of one who has died in consequence of injuries sustained while being transported by a railroad company where the injured party could have maintained an action had he survived.

6. All statutes *in pari materia* must be taken together and construed as if they were one enactment, and, if possible, effect given to every provision.

7. Section 3, article 1, chapter 72, Compiled Statutes, is not inimical to the fourteenth amendment of the Constitution of the United States or to sec. 3, art. 1, of the constitution of this State, as tending to deprive railroad companies of their property without due process of law.

261 8. Instructions should be construed together, and if, when so considered, they state the law correctly, applicable to issues and evidence, they will be sustained.

9. Instructions in this case examined and held free from reversible error.

262 NORVAL, *C. J.*:

In 1894 Ernest H. Zernecke was killed in a train wreck while a passenger of the Chicago, Rock Island & Pacific Railway Company, and his wife, as administratrix of his estate, brought this action to recover damages therefor for the benefit of herself and minor children. The train was wrecked by the criminal act of a third person without fault on the part of the railway company. On the trial a verdict was rendered in favor of plaintiff, and judgment was entered thereon, from which the railway company comes to this court on error.

On the trial the following instructions *was* given by the court; to which the defendant took exceptions:

"The jury are instructed that if you find from the evidence that Ernest H. Zernecke was a passenger being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Zernecke, and that plaintiff is his administratrix and she and her children had a pecuniary interest in his life and suffered loss by his death, then you should find for the plaintiff."

Sec. 3, art. 1, chap. 72, Compiled Statutes, declares that "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road except in cases where the injury done arises from the criminal negligence of the person injured or when the injury complained of shall be the violation of some express rule or regulation of said

road actually brought to his or her notice." The instruction quoted is within the provision of said section, aside from the omission to the State exceptions contained in the statute that the defendant was not liable for injury resulting from the criminal negligence of the person injured, or from his violation of some expressed rule or regulation of the company actually brought to the notice of the insured passenger. There is an entire absence of any evidence in the
263 record before us tending to bring the case within either of the exceptions contained in said section 3, therefore the instruction was pertinent and proper if said legislation is constitutional and applicable to the case at bar.

The constitutionality of said section has been assumed by this court in numerous cases (Chollotte *v.* Omaha & R. V. R. Co., 26 Neb., 159; Omaha & R. V. R. Co. *v.* Chollotte, 33 Neb., 143; Missouri P. R. Co. *v.* Baier, 37 Neb., 235; Chicago, B. & Q. R. Co. *v.* Hayne, 48 Neb., 97; Chicago, B. & Q. R. Co. *v.* Hyatt, 48 Neb., 161; Freemont, E. & M. V. R. Co. *v.* French, 48 Neb., 638), and the validity of said statute has been expressly decided in Union P. R. Co. *v.* Porter, 38 Neb., 226; Omaha & R. V. R. Co. *v.* Chollotte, 41 Neb., 578; Chicago, R. I. & P. R. Co. *v.* Young, 79 N. W. Rep., 556. The legislation is justifiable under the police power of the State, so it has been held. It was enacted to make railroad companies insurer of the safe transportation of their passengers, as they were of baggage and freight, and no good reason is suggested why a railroad company should be released from liability for injuries received by a passenger while being transported over its line, while the corporation must respond for any damages to his baggage or freight.

It is argued by counsel for the defendant below that said section 3 is not applicable to cases of injuries causing the death of a passenger, the contention being that section 1, chapter 21, Compiled Statutes, is the law governing this class of actions, and that under the provisions of said last-named statute the defendant should have been permitted to prove that the death of plaintiff's husband was not caused by any act of negligence on the part of the railway company, and that the jury should have been instructed that before there could be a recovery it was necessary to establish the
264 fact that defendant company had been negligent in the premises. It is further argued that if it be held that said first-named statute is the law governing this class of cases, then the same has been repealed by said chapter 21, which is a later enactment, and that the two are in conflict. If the two statutes are in conflict the argument is unanswerable; but it is believed that the two statutes do not in anywise conflict one with the other. Said section 3, as already stated, makes a railroad company an absolute insurer of the safety of its passengers, save in cases falling within one or the other of the two exceptions mentioned in the statute. It gives or creates a right of action in favor of the injured passenger, and when it is established that a person is injured while a passenger of a railroad company a conclusive presumption of negligence arises in every case except where it is disclosed that the injury was one caused by his own criminal negligence or by his violation of some

rule of the company brought to his actual notice. On the other hand, chapter 21, Compiled Statutes, known as the "Lord Campbell's act," creates a right of action in favor of the personal representation of the deceased where none existed before. It is very broad in its terms, being applicable to all acts of negligence, whether on the part of a railway company or others. Under said section 3, article 1, chapter 72, a litigant establishes an act of negligence or a default on the part of defendant railway company when the fact is disclosed that he was a passenger of such railway company, and while such passenger was injured. In other words, a conclusive presumption of negligence arises where the case does not fall within the exceptions of the law and he has his right of action. Prior to the adoption of said section 3 in 1867 he would have had to affirmatively established some act of negligence on the part of the railway company to entitle him to recover for injuries received while a passenger.

From the time this section was passed until said chapter 21 was adopted, in 1873, no right of action existed for negligence resulting in the death of a person, but said chapter in broad terms gives a right of action for the death of a person caused by the
265 wrongful act, neglect, or default of another, if the same is such as would, if death had not insued, entitled the party injured to maintain an action to recover damages in respect thereof. Now, it is indisputable that if Zernecke had been injured merely, and not killed, he would have recovered against the railway company under said section 3, article 1, chapter 72, and that thereunder said injuries would have been deemed to have been caused by the wrongful acts, neglect, or default of the said railway company, in failing to carry such passenger safely. Hence, this case falls within the scope of said chapter 21, and the fact of negligence or the defendant's wrongful acts or default is established when the evidence discloses the facts specified in said section 3 of chapter 72. The two statutes are not in conflict, for the reason that one creates a liability in favor of the passenger himself, and obviates the necessity of proving the negligence of the carrier, while the other statute gives a right of action, where none existed before, to the personal representatives of a deceased person in all cases where such person could have recovered damages for his injury if death had not insued (Ean *v.* Chicago, M. & St. R. Co., 95 Wis., 69; Philo *v.* I. C. R. Co., 33 Iowa, 47). The rule is that all statutes *in pari materia* must be taken together and construed as if they were one enactment (Hendrix *v.* Reiman, 6 Neb., 516; State *v.* Babcock, 21 Neb., 599; People *v.* Weston, 3 Neb., 322). Statutes should be so construed, if possible, *so* as to give effect to every provision, and an act should not be placed in antagonism with another act, unless such was the manifest purpose and object of the legislature (McCann *v.* McLennan, 2 Neb., 286; Burlington & M. R. Co. *v.* Webb, 18 Neb., 215; State *v.* Babcock, 21 Neb., 599). Tested by these principles the conclusion is irresistable that said section 3, article 1, chapter 72, Compiled Statutes, was not amended by chapter 21 of said statutes, known as "Lord Campbell's act."

It is further contended that section 3, chapter 72, is in conflict with the 14th amendment of the Constitution of the United
266 States, and with section 3 of article 1 of the constitution of this State, as tending to deprive railroad companies of their property without due process of law. This court has decided to the contrary in Chicago, R. I. & P. Co. *v.* Young, 79 N. W., 556, and cases therein cited, and we see no reason for departing from the law as therein laid down. (See Clark *v.* Russell, 79 Feb., 900; Missouri P. R. Co. *v.* Mackey, 127 U. S., 205; Railroad Co. *v.* Mathews, 165 U. S., 1; Railroad Co. *v.* Paul, 173 U. S., 404.)

The following instruction was given by the court: "If, under the evidence and instructions of the court, the jury find for the plaintiff, then, in assessing the damages which the plaintiff is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the wife and children of the deceased, and, determining this, you may consider the probable earnings of the deceased, his age, business capacity, experience, habits, health, bodily and mental qualifications, during what probably would have been his lifetime, if he had not been killed, so far as these matters have been shown by the testimony, and you may also consider the value his services might have been in the superintendence and attention to and care of his family and the education of his children, but the amount you can allow cannot exceed the sum of $5,000."

It is not contended that in the portion of the instruction which directed the jury that in considering the question of what the value of the services of the deceased might have been in the superintendence and care of his family and the education of his children, etc., the jury were not required to confine themselves to the evidence, but were "turned loose," without anything to guide them in ascertaining the value thereof. We do not think so. In a general instruction they were told that in case they found for the plaintiff it must be for pecuniary damages alone, which they must find from the evidence the plaintiff and her children had suffered, and no doubt the jury considered the two instructions together in passing upon the element of damage. There was evidence on which to base the instruction, and we do not doubt that under the instructions
267 the jury gave it only its due weight. It is further urged that the court, in this clause of the instruction, should have used the word "probably" instead of the word "might." We have no doubt that the former word is the better of the two in that connection, but jurors are not given to nice distinctions in words, and we cannot imagine that they, in anywise, — mislead by the use of the word, rather than the other.

We have carefully examined all the arguments adduced in the briefs of counsel, but fail to find any error reversible in the record. Wherefore the judgment of the lower court is affirmed.

268 THE STATE OF NEBRASKA, *ss:*

I, D. A. Campbell, clerk of the supreme court of said State, do hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the case of The Chicago, Rock

Island and Pacific Railway Company, plaintiff in error, against Bertha Zernecke, administratrix of the estate of Ernest Zernecke, deceased, defendant in error, as fully as the same remains on file and of record in my office.

Seal Supreme Court of Nebraska.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said court, at the city of Lincoln, this 25th day of April, A. D. 1900.

D. A. CAMPBELL, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 4, 25, '00. D. A. C.]

269 In the Supreme Court of the State of Nebraska.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
BERTHA ZERNECKE, Administratrix of the Estate of Ernest H. Zernecke, Deceased, Defendant in Error.
No. 9149.

Comes now said The Chicago, Rock Island and Pacific Railway Company, plaintiff in error in the above-entitled cause, and says that in the record and proceedings of the supreme court of Nebraska in said cause there is manifest error, in this, to wit:

I.

That said supreme court of the State of Nebraska erred in rendering judgment against said plaintiff in error and in favor of said defendant in error.

II.

That said supreme court of the State of Nebraska erred in failing and refusing to render judgment in favor of said plaintiff in error and against said defendant in error.

III.

That said supreme court of the State of Nebraska erred in affirming the judgment of the district court of Nebraska within and for Thayer county.

IV.

That said supreme court of the State of Nebraska erred in holding and deciding that section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska is not inimical to the Constitution of the United States.

270 V.

That said supreme court of the State of Nebraska erred in holding and deciding that said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska is not inimical to the fourteenth amendment to the Constitution of the United States, as

tending to deprive railway companies of their property without due process of law.

VI.

That said supreme court of the State of Nebraska erred in holding and deciding that said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska is not contrary to and in conflict with the Constitution of the United States.

VII.

That said supreme court of the State of Nebraska erred in holding and deciding that said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska is not contrary to and in conflict with the fourteenth amendment to the Constitution of the United States, as tending to deprive railway companies of their property without due process of law.

VIII.

That said supreme court of the State of Nebraska erred in holding and deciding that proof of injury to a person while being transported over a railroad as a passenger creates a conclusive presumption, under said section 3 of article 1 of chapter 72 of the Com-
271 piled Statutes of said State of Nebraska, that such injury was caused by the negligence of the carrier.

IX.

That said supreme court of the State of Nebraska erred in holding and deciding that proof of the death of a person while being transported over a railroad as a passenger creates a conclusive presumption, under said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska, that such death was caused by the negligence of the carrier.

X.

That said supreme court of the State of Nebraska erred in holding and deciding that said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska creates a conclusive presumption of negligence against carriers in all cases where persons are injured while being transported over railways as passengers, except when it is disclosed that the injury was one caused by the passenger's own criminal negligence or by his violation of some rule of the company or carrier brought to his actual notice.

XI.

That said supreme court of the State of Nebraska erred in holding and deciding that said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska creates a conclusive presumption of negligence against carriers in all cases where persons are killed while being transported over railways as passengers, ex-

cept when it is disclosed that such a death was caused by the
272 passenger's own criminal negligence or the violation of some rule of the company or carrier brought to his actual notice.

XII.

That said supreme court of the State of Nebraska erred in holding and deciding that by said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska railroad companies are made insurers of the safety of their passengers.

XIII.

That said supreme court of the State of Nebraska erred in holding and deciding that the plaintiff in error was and is liable in the case at bar for damages resulting from the death of the deceased, Ernest H. Zernecke, said death having been caused by the criminal act of a third person without fault on the part of the plaintiff in error.

XIV.

That said supreme court of the State of Nebraska erred in holding and deciding that the following statute of said State of Nebraska is not contrary to and in conflict with the Constitution of the United States: "Every railroad company as aforesaid shall be liable for all damages inflicted on the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."

Section 3, article 1, chapter 72, Compiled Statutes.

273 Wherefore your petitioner respectfully prays that a writ of error may be issued in said cause, directed to the clerk of the supreme court of the State of Nebraska, commanding said court to certify and send to the Supreme Court of the United States a full and complete transcript of the record and all proceedings of said supreme court of the State of Nebraska in said cause, wherein The Chicago, Rock Island and Pacific Railway Company is plaintiff in error and Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased, is defendant in error, and that said judgment of said supreme court of the State of Nebraska in said cause and every part thereof may be reversed by the Supreme Court of the United States, and your petitioner will ever pray.

M. A. LOW,
W. F. EVANS,
L. W. BILLINGSLEY, AND
R. J. GREENE,
Attorneys for Plaintiff in Error.

274 [Endorsed:] 9149. In the supreme court of the State of Nebraska. The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, *vs.* Bertha Zernecke, adm'x of the estate

of Ernest H. Zernecke, deceased, defendant in error. Assignment of errors. Supreme court of Nebraska. Filed Apr. 7, 1900. D. A. Campbell, clerk.

275 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Nebraska, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, and Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the
276 construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of April, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

276½ [Endorsed:] 9149. The Chicago, Rock Island and Pacific Railway Company *v.* Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased. Writ of error. Supreme court of Nebraska. Filed Apr. 16, 1900. D. A. Campbell, clerk.

THE STATE OF NEBRASKA, *ss:*

In obedience to the command of the within writ, I, D. A. Campbell, clerk of the supreme court of said State, herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same, to wit, assignment of errors, writ of error, copy of bond, and citation and proof of service.

Seal Supreme Court of Nebraska.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said court, at the city of Lincoln, this 25th day of April, A. D. 1900.

D. A. CAMPBELL. *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 4, 25, '00. D. A. C.]

277 UNITED STATES OF AMERICA, *ss:*

To Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of State of Nebraska, wherein The Chicago, Rock Island & Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 11th day of April, in the year of our Lord one thousand nine hundred.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

277½ [Endorsed:] 9149. The Chicago, Rock Island & Pacific Railway Company *v.* Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased. Citation. Supreme court of Nebraska. Filed Apr. 16, 1900. D. A. Campbell, clerk.

On this 16th day of April, in the year of our Lord one thousand nine hundred, personally appeared J. H. Naden before me, the subscriber, clerk of the supreme court of the State of Nebraska, and makes oath that he delivered a true copy of the within citation to Thomas C. Munger, a member of the firm of Stewart & Munger, the attorneys of record of the within-named Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased.

J. H. NADEN.

Sworn to and subscribed the 16th day of April, A. D. 1900.

[Seal Supreme Court of Nebraska.]

D. A. CAMPBELL,
Clerk of the Supreme Court of Nebraska.

278 And afterward, to wit, on the 16th day of April, 1900, there was filed in the office of the clerk of said court a certain bond in words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company, Plaintiff in Error,
vs.
BERTHA ZERNECKE, Administratrix of the Estate of Ernest H. Zernecke, Deceased, Defendant in Error.
No. 9149. Bond.

Know all men by these presents that we, the Chicago, Rock Island and Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and W. H. Dorgan and J. D. Parker, of the city of Lincoln, State of Nebraska, are held and firmly bound unto the said Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased, defendant in error, *his* heirs, executors, and administrators, in the sum of ten thousand dollars ($10,000.00); to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of — heirs and successors, executors, and administrators, firmly by these presents.

Sealed with our seals this 4th day of April, A. D. 1900.

Whereas the above-named The Chicago, Rock Island and Pacific Railway Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Nebraska:

Now, therefore, the condition of this obligation is such that if the above-named The Chicago, Rock Island and Pacific Railway Company shall prosecute its said writ of error to effect and an-
279 swer all costs and damages if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

[SEAL.] W. F. EVANS,
Its Agent and Assistant General Attorney.

[SEAL.] W. H. DORGAN.

[SEAL.] J. D. PARKER.

Approved by—
DAVID J. BREWER,
Associate Justice Sup. Crt. U. S.

Apr. 11th, 1900.

THE STATE OF NEBRASKA, *ss:*

I, D. A. Campbell, clerk of the supreme court of Nebraska, do certify that I am acquainted with W. H. Dorgan and J. D. Parker, sureties on the foregoing bond.

I further certify that I consider the sureties amply sufficient and good for the sum of ten thousand dollars over and above all incumbrances and exemptions, and were I taking said bond I would approve the same.

In testimony whereof I have hereunto set my hand and seal of said supreme court this 7th day of April, A. D. 1900.

D. A. CAMPBELL,
[SEAL.] *Clerk Supreme Court of Nebraska.*

Endorsed: 9149. The Chicago, Rock Island and Pacific Railway Company *vs.* Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased. Bond. Supreme court of Nebraska. Filed April 16th, 1900. D. A. Campbell, clerk.

Endorsed on cover: File No., 17,749. Nebraska supreme court. Term No., 274. The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, *vs.* Bertha Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased. Filed May 10th, 1900.

No. 274.

Brf. of Evans & Low for Pl.

Office Supreme Court U. S.
FILED
APR 15 1901
JAMES H. McKENNEY,
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Filed April 15, 1901.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

v.

BERTHA ZERNECKE, ADMINISTRATRIX OF THE ESTATE OF ERNEST H. ZERNECKE, DECEASED, *Defendant in Error.*

No. 274.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

This action was brought in the court below by the defendant in error to recover from the plaintiff in error damages that resulted from the death of Ernest H. Zernecke, deceased, who was killed upon the railway of the plaintiff in error in Lancaster County, State of Nebraska, by the criminal act of one George Washington Davis, on the 9th day of August, 1894. Davis killed the deceased and ten other persons, one of whom was Wm. O. Ham-

bel, by tearing up the track of the plaintiff in error, and derailing one of its passenger trains, upon which the deceased and the other ten persons, who were killed, were being transported by the plaintiff in error as passengers.

Davis was thereafter indicted, tried, and convicted of murder in the first degree for the killing of said Wm. O. Hambel at the time and in the manner above stated. His case was appealed to the Supreme Court of that State, where the judgment of the trial court was affirmed, and he is now confined in the penitentiary of said State, serving a life sentence as his punishment for said crime.[1]

In stating her cause of action against the railway company the plaintiff in her petition avers:

"1st. The plaintiff complains of the defendant and alleges that on the 10th day of November, 1894, this plaintiff was duly appointed and qualified as administratrix, and letters of administration were duly issued and granted to her, of the estate of Ernest Zernecke, deceased, by the probate court of Lancaster County, Nebraska, and the plaintiff sues as such administratrix.

"2d. That the defendant is and at the times hereinafter mentioned was, a corporation duly incorporated under the laws of the State of Nebraska, and owned and operated a railroad therein known as the Chicago, Rock Island and Pacific Railway, and was and is a common carrier of passengers for hire between the places hereinafter mentioned, and between the stations of Martel, Nebraska, and Lincoln, Nebraska, all of which railroad between said stations is in the State of Nebraska.

"3d. On or about the 9th day of August, 1894, the said defendant, in consideration of the sum of 41 cents, received the said Ernest H. Zernecke, then living, as a passenger on said railroad from Martel, Nebraska, to said

[1] Davis v. State, 51 Neb. 301.

Lincoln, Nebraska, and while said Ernest H. Zernecke was on the cars, on said journey, as a regular passenger, at a distance of about five miles south of Lincoln, Nebraska, and in this State, the car in which said Ernest H. Zernecke was riding was by the negligence of the defendant and its servants derailed, thrown from and ran off the track, and said Ernest H. Zernecke was, without fault or negligence on his part, thereby killed.

"4th. Plaintiff further alleges that said Ernest H. Zernecke left the plaintiff, Bertha Zernecke, his widow, him surviving; Zilda Zernecke, his daughter, aged eight years; Marie Zernecke, his daughter, aged six years; and Carl F. Zernecke, his son, aged one year, his only children and next of kin, who were dependent upon him for support, and said children were dependent upon him for maintenance and education also.

"Plaintiff further avers that said Ernest H. Zernecke was at the time of his death about 40 years of age and in good health, able to perform manual labor and to conduct general real estate and abstracting business, in which he was then engaged; that he was able to earn and did earn thereby the sum of $2,000 per year, and that the earnings from his said business were applied to the support and maintenance of his said family, the plaintiff and their said minor children, and that his said labor and business were the only means of support, education and maintenance possessed by said family, and said widow and minor children of said Ernest H. Zernecke have sustained permanent damage by reason of the aforesaid wrongful act, neglect and default of said defendant in the sum of five thousand dollars.

"Wherefore plaintiff prays, as such administratrix, for judgment against the defendant for the amount of five thousand dollars and costs of suit."[1]

The plaintiff in error answered as follows:

"1st. Comes now, said defendant, and for answer to plaintiff's petition in the above entitled cause denies all and singular the allegations thereof, except such as are hereinafter expressly admitted.

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[1]Record, 8, 9.

"2d. Further answering, the defendant admits and avers:

"1st. That it is and at all times mentioned in said petition was a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and a domestic corporation of the State of Nebraska.

"2d. That at all times mentioned in said petition it was the owner of and was operating a railroad in the State of Nebraska, and was and is a carrier of passengers for hire between the stations of Martel, Nebraska, and Lincoln, Nebraska, on said railway. But the defendant denies that the said Ernest H. Zernecke, deceased, mentioned in said petition, was injured in any way by reason of the carelessness or negligence of this defendant, or any of its servants, agents or employes, and denies that the said Ernest H. Zernecke was killed by reason of any carelessness or negligence on the part of the defendant, or any of its servants, agents or employes.

"3d. Further answering, the defendant avers that on or about the 9th day of August, 1894, near Lincoln, in the County of Lancaster, State of Nebraska, and at the time in said petition stated, the train and car mentioned in said petition, while being run and operated with all possible care and caution, were, by some person or persons not in the employ or under the control of the defendant and without its knowledge wilfully, maliciously and feloniously derailed and thrown from the track on which they and each of them were at said time being run and operated, resulting in great loss to the defendant, its servants, agents and employes; that said person or persons who derailed and threw said train and car from the track as aforesaid, wilfully, maliciously and feloniously removed and displaced from the track aforesaid at the point of said derailment certain spikes, nuts, angle-bars, fish-plates, bolts and rails, and otherwise tore up and destroyed said track of defendant at the point aforesaid, and caused said car and train to be derailed and thrown from the track, as aforesaid, without any carelessness or negligence on the part of the defendant, or any of its agents, servants or employes;

that said car and train at the time of being derailed and thrown from the track, as aforesaid, and at all other times, was operated and run in a skillful and proper manner and with great care and caution; that the said railroad and track at the point aforesaid and at all other points was kept and maintained in good and safe condition and repair, and that the defendant did not know, and had no means of knowing, at the time of said derailment or prior thereto, of the removal or displacement from said track of said nuts, bolts, angle-bars, fish-plates and rails or either of them, and did not know and had no means of knowing that said track at said point had been torn up or destroyed, and that the defendant could not by the exercise of the utmost care, caution, prudence and foresight have prevented said derailment and wrecking of said train and car.

"The defendant avers that as to whether said Ernest H. Zernecke, mentioned in said petition, was on said train or car at the time of said derailment it has not knowledge or information thereof sufficient to form a belief, and that as to whether the said plaintiff was on the 10th day of November, 1894, or at any other time, duly appointed and qualified as administratrix of the estate of said Ernest H. Zernecke, deceased, the defendant has not knowledge or information thereof sufficient to form a belief.

"And, having fully answered, the defendant asks to be discharged hence with its costs in this behalf laid out and expended."[1]

The statute upon which this action is founded, and which is the only statute of Nebraska giving or creating a right of action for the death of a person, is as follows:

"An Act authorizing the recovery of damages by the personal representatives of a person whose death is caused by the wrongful act of a person, company or corporation:

"SECTION 1. That wherever the death of a person shall

[1] Record, 9, 10.

be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then, and in every such case, the person who, or the company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."[1]

This act is the same as the act known as "Lord Campbell's act," passed in 1846.

It will be observed both from the body and title of this act that a cause of action is not created unless the death "shall be caused by the wrongful act, neglect, or default" of the person sought to be charged.

Upon the trial the defendant in error introduced evidence tending to prove that at the time the deceased was killed he was being transported over the railway of the plaintiff in error; and that the train upon which he was traveling was derailed and thrown from the track, resulting in his death and the death of ten other persons. The railway company then called many witnesses and offered to prove by them the way and manner in which the railway and train were constructed, operated and maintained at all times in question; that it was not guilty of any negligence or carelessness in the construction, operation or maintenance of them or either of them; that the death of the deceased was not "caused by the

[1] Comp. Laws of Neb., 1899, p. 491.

wrongful act, neglect or default" of the plaintiff in error; that it could not by the exercise of the greatest care, caution, prudence and foresight have prevented the derailment of said train or the death of said deceased; and that the deceased was killed by Davis in the manner above stated.

Notwithstanding the statute upon which the action is based, and upon which it must be maintained, if at all, provides that before a recovery can be had the death "shall be caused by the wrongful act, neglect or default" of the party sought to be charged, the court denied the offer and excluded the evidence. The court also, upon the motion of the defendant in error, suppressed the depositions of several witnesses for the plaintiff in error, which showed clearly and without conflict that the death of the deceased was not caused by the "wrongful act, neglect, or default" of the plaintiff in error.

At the close of the evidence the court, on motion of the defendant in error, instructed the jury as follows:

"1. The jury are instructed that if you find from the evidence that Ernest H. Zernecke was a passenger, being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Zernecke, and that plaintiff is administratrix, and she and her children had a pecuniary interest in his life and suffered loss by his death, then you should find for the plaintiff."[1]

[1] Record, 17.

And refused to give to the jury the following instruction requested by the railway company:

"The court instructs the jury that if the defendant, in the operation and maintenance of its railroad and trains, used and observed all possible care, caution and foresight to prevent accident and to care for its passengers that was practicable in its operation of said road and trains, then the defendant would not be liable in this case, and your verdict should be for the defendant." [1]

The jury returned a verdict in favor of the plaintiff below for $4,500, upon which judgment was rendered against the railway company. The plaintiff in error, by proper proceedings, took the case to the Supreme Court of the State, where the judgment of the trial court was affirmed,[2] and it then brought the case to this court.

The Supreme Court, in deciding and rendering judgment against the plaintiff in error, held and adjudged that the following statute of that State, passed in 1867, created a *conclusive presumption of negligence* against the plaintiff in error:

"Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." [3]

The district court and the Supreme Court of the State held that it *was finally and conclusively determined* by

[1] Record, 15.
[2] Record, 174, 177.
[3] Comp. Laws of Neb. 1899, p. 838.

the statute just quoted that the death of the deceased was "caused by the wrongful act, neglect or default" of the plaintiff in error and that evidence on the part of the plaintiff in error respecting the manner in which the deceased was killed was incompetent and could not be considered in any way, unless it showed that the deceased was killed by his *own criminal negligence.*

The Supreme Court, in referring to this statute said:

"It gives or creates a right of action in favor of the injured passenger, and when it is established that a person is injured while a passenger of the railroad company *a conclusive presumption of negligence* arises in every case, except where it is disclosed that the injury was one caused by his own criminal negligence or by his violation of some rule of the company brought to his actual notice. . . . In other words, *a conclusive presumption of negligence* arises when the case does not fall within the exceptions of the law and he has his right of action. . . . Now it is indisputable that if Zernecke had been injured merely, and not killed, he would have recovered against the railway company under said section 3, article 1, of chapter 72, and that thereunder said injuries would have been deemed to have been caused by the wrongful acts, neglect or default of the said railway company in failing to carry such passenger safely. Hence this case falls within the scope of said chapter 21 and the *fact of negligence*, or defendant's *wrongful acts or default is established* when the evidence discloses the facts specified in said section 3 of chapter 72."[1]

The plaintiff in error contended in the trial court, as well as in the Supreme Court, that this statute, that is, the one *creating a conclusive presumption of negligence* was

[1] Record, 175, 176.

and is in contravention of the Fourteenth Amendment to the Federal Constitution, and that it deprives the railway company of its property "without due process of law" and denies to it "the equal protection of the laws." This contention was denied by the Supreme Court and by the trial court.

SPECIFICATIONS OF ERROR.

Said plaintiff in error says that in the record and proceedings of said Supreme Court of the State of Nebraska, in said cause, there is manifest error in this:

1. That said court erred in affirming the judgment of the district court of Nebraska in said cause.

2. That said court erred in rendering judgment against the plaintiff in error and in favor of defendant in error.

3. That said court violated the Fourteenth Amendment to the Federal Constitution and deprived the plaintiff in error of its property without due process of law, and denied to it the equal protection of the laws.

4. That said court erred in holding and deciding that the following statute of the State of Nebraska was not unconstitutional:

"SEC. 3. Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury

complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."

6. That said court erred in holding and deciding that the statute set out in specification of error number four hereof was not in contravention of the Federal Constitution.

7. That said court erred in not reversing said judgment of said district court of the State of Nebraska.

8. That said court erred in holding and deciding that the statute set out in specification of error number four hereof was not in contravention of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

"Sec. 3. Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."[1]

This statute, as construed by the Supreme Court of the State, which construction is conclusive upon this court and cannot be "re-examined here as to its propriety or accuracy," is in contravention of the Fourteenth Amendment to the Federal Constitution in this, that when enforced it deprives the plaintiff in error of its property "without

[1] Comp. Laws of Neb. 1899, p. 838.

due process of law" and denies to it "the equal protection of the laws."[1]

1. The statute known as "Lord Campbell's act" is the only statute in Nebraska which creates or gives a right of action for the death of a person, and it, as well as all other statutes of that character, expressly provides that an action can be maintained only where the death shall be caused by the "wrongful act, neglect, or default" of the person sought to be charged. In other words, no right of action is given when the death is not caused by wrongful act, neglect, or default. The right of recovery and the liability in all cases must be measured and determined by this statute, and the liability is not imposed or created except on the conditions therein stated. The right of the plaintiff in error to be heard and present evidence on the determination of this question of fact is reserved by the statute upon which the action is based and protected by the Fourteenth Amendment to the Federal Constitution. But the law-making power of the State attempts by this statute of 1867 to create a *conclusive* presumption of negligence against the railway company; to adjudge and to determine conclusively, without a hearing and without a trial, that the plaintiff in error was guilty of a wrongful act, neglect, or default,

[1] Ry. Co. v. Minn., 134 U. S. 418, 456.
Ry. Co. v. Ill., 163 U. S. 142, 152.
Ry. Co. v. Neb., 164 U. S. 403, 414.

and that it resulted in the death of the deceased, and to deny a trial and a hearing in the determination of this question. The right of defense—the right of a trial, and the right to controvert by proof every material fact which bears on or involves the question of liability—is just as valuable and is protected to the same extent as the right of action or the right to sue. They are relative rights and are of the same value and importance and protected to the same extent by the Federal Constitution.

This right has been well stated by this court, as follows:

"Wherever one is assailed in his person or his property there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations."[1]

Again:

"The liability and the right are inseparable. A different result would be a blot on our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and the right administration of justice."[2]

The lawmaking power cannot determine by an act that the plaintiff in error has been negligent or careless, or that a *conclusive* presumption of negligence or carelessness arises against the carrier from proof that a passenger was injured, regardless of the manner in which the injury was sustained.

[1] Windsor v. McVeigh, 93 U. S. 274, 277.

[2] McVeigh v. U. S., 11 Wall. 259, 267.

Mr. Webster, in speaking of the powers of the Legislature and their separation from the judicial functions of the government, said:

"It (the Legislature) shall not adjudge by act; it shall not decide by act; it shall not deprive by act, but it shall leave all things to be tried and adopted by the law of the land."

Referring to "due process of law," Mr. Cooley says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. . . Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.'

"The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial.' It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense."[1]

"The idea," say sMr. Justice HARLAN, in speaking for this court, "that any legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked to see to it that no right secured by the supreme law of the land is impaired or destroyed by a legislature. This function and duty of

[1]Cooley's Const. Lim. 6th ed. 431.

the judiciary distinguishes the American system from all other systems of government."[1]

The Legislature by the act in question determines without a trial, without a hearing, without notice, and without inquiry, that the railway company has been guilty of negligence—that certain facts shall be *conclusive evidence of negligence* against the plaintiff in error. It is thereby deprived of any inquiry on this question and of the right of introducing evidence showing that it was not guilty of the negligence charged, and without which it was not liable.

The following language is especially applicable here:

"Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

"We have held that it is within the power of legislation to declare that certain proofs shall be *prima facie* evidence of specified facts. But at the same time we decided that the legislature could not constitutionally ordain that such proofs should be conclusive evidence of material facts in controversy. The first is a mere rule of evidence. The last has been characterized as 'a confiscation of property.'"[2]

It is well settled that the legislature may lawfully provide what shall be received as evidence, but it cannot

[1] Smyth v. Ames, 169 U. S. 466, 527.

[2] Zeigler v. South & North Ala. R. Co., 58 Ala. 594, 599.

make that *conclusive* which may be shown to be false; it cannot manufacture falsehood into truth, or give to falsehood or untruth the conclusive validity of truth.

In discussing this question, Mr. Cooley says:

"But there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as to altogether preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon like reasons, it would not, we apprehend, be in the power of the Legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs."[1]

On this question the Supreme Court of Arkansas says:

"It is not within the province of the Legislature to divest rights by prescribing to the courts what should be conclusive evidence. This matter was fully considered in *Fulton Railroad Company v. Parks*, 32 Ark. 131, which arose under a statute which endeavored to make a county clerk's deed of lands, sold for taxes, *conclusive* of its recitals against the true owner. Justice Walker, in delivering the opinion, remarked: 'The Legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false;' * * * Railroad companies have the right to run their trains, and the consequent right of being protected in doing so, unless damage to others should result from some negligence, want of due care

[1] Cooley's Const. Lim., 6th ed. p. 452.

or culpable neglect of reasonable precautions imposed by the legislative power. It affects their substantial rights of property to be able to show the facts, and they cannot be constitutionally deprived of the power."[1]

The same court, in the case of *Cairo & Fulton R. Co. v. Parks*, said:

"To make proof of certain facts by one party 'conclusive evidence of their truth,' and to deny to the party who desires the truth of them, the privilege of proving them to be false, is, in effect, manufacturing falsehood into truth, or giving to falsehood the validity and effect of truth. If the Legislature has power to do this, then, that provision in the bill of rights, which ordains that, 'no one shall be deprived of life, liberty, or property, but by the judgment of his peers, or the law of the land,' is a dead letter, because to deprive the citizen of the right to protect his property by showing that it has been taken from him contrary to law, is, in effect, denying to him the protection of the law."[2]

The Legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false.

In the case of *Wantlan v. White*,[3] the Supreme Court of Indiana said:

"It is not competent for the legislative power to declare what shall be conclusive evidence of a fact."

Again:

"Statutes which undertake to make proof of certain facts absolute or conclusive of guilt are unconstitutional. Those which merely declare statutory presumptions affecting the burden of proof are valid."[4]

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[1] L. R. & F. S. R. Co. v. Payne, 33 Ark. 816, 819.
[2] 32 Ark. 132, 145.
[3] 19 Ind. 472.
[4] Voght v. The State, 124 Ind. 358, 362.

The same principle is stated by the Supreme Court of Minnesota in the case of *Vega Steamship Company v. Consolidated Elevator Company.*[1] In that case the question involved was whether the Legislature had power to make the certificate of the public weighmaster conclusive evidence. In stating the rule for which we contend, the court said:

"But is it competent for the Legislature to make the weight thus ascertained absolutely conclusive? We are of the opinion that it is not. The Legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court. See Cooley Const. Lim. (6th ed.) 452; 6 Am. & Eng. Ency. Law (2d ed.) 1050; *Graves v. Northern*, 5 Mont. 556, 6 Pac. 16; *Johns v. State*, 55 Md. 362, 363; *Wantlan v. White*, 19 Ind. 470."

A case directly in point is that of *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*,[2] decided by this court. In that case was involved the validity of a statute of Minnesota by which rates made and adopted by a railroad and warehouse commission were made "*not simply advisory, nor prima facie equal and reasonable, but final and conclusive.*"

This court, in holding that statute in contravention of the Federal Constitution, and, therefore, unconstitutional, used the following language:

[1] 75 Minn. 308, 312.

[2] 134 U. S. 418, 457.

"We are of opinion that . . . it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice."

Let us assume for the purpose of the argument that the Legislature could declare that proof of the possession of property shall be conclusive evidence of its ownership. Would any person contend that the act would be valid? Certainly not. Or let us assume, as the Supreme Court of Iowa says, that if "the Legislature should declare that an indictment duly found by the grand jury should be conclusive evidence of guilt against the accused, would this deprive him of his liberty without due process of law? If so, where is the line at which the legislative power begins and where does it end?"

No lawyer would contend that life or liberty could be taken by a statute similar in principle to the one in question, or that a statute reading as follows would be "due process of law" or constitutional:

"Whenever a person who is being transported on a railroad train as a passenger shall be killed, the conductor or other person in charge of the train at such time shall be guilty of murder."

Nor is it within the power of the Legislature to declare that on the trial of a person charged with murder, proof of certain facts shall be conclusive evidence of the guilt of the accused. This is elementary. Yet, life, liberty and property are placed on an equal footing by the constitution—are placed in the same category. They are grouped together in the same sentence, and each, as opposed to the unlawful deprivation thereof, is of equal constitutional importance.[1]

If the Legislature may lawfully declare that proof of any injury to a passenger shall be conclusive evidence of negligence or carelessness on the part of the carrier, it may also lawfully declare that the same proof of injury, or, in the legislative caprice, proof of any other fact, shall be conclusive evidence that the injured person was in fact a passenger of the carrier. In this direction it might go so far as to declare that proof of any injury to any person, for example, a person not in or upon any train of the carrier, but upon its track or a highway crossing, or upon its station grounds at the time of the injury, shall be conclusive evidence that the person so injured was in fact a passenger of the carrier. In this manner every question of fact involved in a case could be conclusively determined by the Legislature before trial and without a hearing of any kind.

[1] Wynehamer v. People, 13 N. Y. 378. | State v. Julow, 129 Mo. 163.

But a hearing and a trial under such circumstances, when the questions of fact upon which is based the right of recovery and liability are finally and conclusively fixed and determined against one party and in favor of the other, is not such a trial or hearing as is meant by "due process of law," or that which is guaranteed by the Federal Constitution.[1] The statute which closes a party's mouth "absolutely when in court is the same in effect as the law which deprives him of his day in court."[2]

"Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the uses of the common law or the provisions of the Constitution, would be a protection to himself or property."[3]

If it is within the power of the Legislature to say that proof of an injury to a passenger shall be conclusive evidence of negligence against the carrier, it can as well say that the same proof shall be conclusive evidence of negligence on the part of the passenger.

2. Railroad companies are by this statute made liable to a passenger for damages caused by the passenger's own carelessness or want of care.

"Every railroad company," the statute says, shall be liable for all damages sustained by a person while being transported over its road, as a passenger, except in the following cases:

[1]R. Co. v. Chicago, 166 U. S. 226.
[2]Vega Steamship Co. v. Consolidated Elevator Co., 75 Minn. 308; R. Co. v. Minnesota, 134 U. S. 418.
[3]Wright v. Cradlebaugh, 3 Nev. 341, 349.

(1) Where the injury done arises from the "*criminal* negligence" of the person injured; or,

(2) Where the injury complained of shall be the violation of an express rule or regulation of said road actually brought to his or her notice.

This, we submit, gives a right of action against the railway company to a passenger for damages which may have resulted entirely from his own carelessness. And this is true even though the railway company exercised all possible care and caution, and did not in any way contribute to the injury or death. It matters not that the railway company does everything possible to protect and care for the passenger, yet if he loses sight of his own safety and is injured solely by his own negligent and careless act, he can recover under this statute all damages resulting therefrom, if he was not "*criminally*" negligent.

In other words, the railroad company is compelled to compensate him for his failure to exercise ordinary care and prudence for his own safety. He is not only relieved from the duty which rests upon all passengers at all times and under all circumstances to exercise ordinary care and prudence for their own safety, but this statute places a premium upon his failure to observe such care. In effect it says: "You may lay aside all ordinary care and caution; you may violate every rule and regulation of the railroad company that is not ac-

tually brought to your notice; you may be reckless, careless and foolhardy and injure yourself and recover all resulting damages from the railroad company, if you are not *criminally* negligent." The law-making power has no right to compel A to respond in damages to B for B's own carelessness. The statutes of every other State in the Union and of Congress may be searched in vain for a law permitting or authorizing such an outrage or encouraging such a wrong. It is contrary to our form of government, to the Constitution of the United States, and to every principle of right and justice upon which all constitutions are founded, and to which all laws, rules and regulations must conform.

This is not a question of contributory negligence. The statute says the carrier is liable even though the accident was caused entirely by the passenger's negligence.

In the old case of Dr. Bonham, 8 Coke, 118*a*, Lord COKE said:

"It appears in our books that in many cases the common law will control acts of Parliament, and adjudge them to be utterly void; for, when an act of Parliament is against *common right and reason*, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void."

The Supreme Court of Wisconsin says:

"No person, by his own transgression, can create a cause of action in his own favor against another for not interfering. That to which a man consents, or causes by his own action, cannot be considered an injury for

which he can recover damages. . . . *Volenti non fit injuria.*"[1]

Mr. FIELD, in his work on Damages, states the rule as follows:

"'It is the duty of a person to use *ordinary and reasonable care* and means to prevent an injury and the consequences of it. And he can only recover damages for such losses as could not, by such care and means, be avoided.' . . . It is the plaintiff's own fault if he fails to use reasonable efforts, care and diligence to protect himself from injury or loss, and where he fails so to do, he will not be permitted to say that the loss that might have been thus avoided, was caused by the wrong of the defendant; *for it is against the policy of the law as well as common principles of justice to permit a party to reap any advantage from his own negligence or from his own wrong.* . . . In such cases the maxim, *nullus commodum capere probit de injuria sua propria*, applies, and the rule is applicable in cases of contracts as well as in torts."[2]

No person can take advantage of his own wrong.[3]

If a person by his own negligent or wrongful act prevents a thing being done, he cannot recover damages therefor.[4]

REED, J., in speaking for the Court of Appeals of Colorado, in *R. Co. v. Outcalt*,[5] said:

"However it may be in England, it is clear that the contitutions of this and other States confer no power upon the legislature to enact laws in conflict with the principles of *natural justice and equity* of the common law upon which those constitutions were founded, and

[1] Richards v. City of Waupun, 59 Wis. 45, 47; United States v. Wormer, 13 Wall. 25, 29.

[2] Field on Law of Damages, sec. 126; Weeks, Damnum Absque Injuria, sec. 121; Wharton's Legal Maxims, p. 139.

[3] Broom's Legal Maxims, 256.

[4] U. S. v. Peck, 102 U. S. 64, 65.

[5] 31 Pac. 177, 179.

which for centuries have been regarded as fundamental. The general grant of power to make 'reasonable and wholesome laws' is limited; it confers no power to enact a law in violation of the fundamental principles of the common law, as they existed at the time the constitutions were adopted."

In *Calder and wife v. Bull*, Judge CHASE said:

"I cannot subscribe to the omnipotence of a State Legislature or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the State. . . . The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man shall be compelled to do what the laws do not require, nor to refrain from acts which the law permits. There are acts which the Federal or State Legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of the legislative power; as, to authorize manifest injustice by a positive law; or to take away that security for personal liberty or private property, for the protection whereof government was established."

"A few instances," he adds, "will suffice to explain what I mean: A law that punishes a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law which destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers, and, therefore, it cannot be presumed that they have done it. . . . The Legislature . . . cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent private contract; or the right of private property."[1]

It is true carriers are required in transporting passen-

[1] 3 Dallas, 386, 388.

gers to exercise all care that is practicable in the mode of conveyance used by them; but this does not relieve the passenger from exercising ordinary care for his own safety. He is still required to observe such care as is commensurate with the danger which he naturally and voluntarily encounters in traveling, and any law which attempts to relieve him of such care, or to compel another person to respond to him for his failure to use such care for his own safety, is unreasonable, unequal, unconstitutional and void.

Do parties stand equal before the law, or receive its equal protection, when A is required to respond to B for injuries caused by want of care on the part of B? Has the right of property any value, if the property of railroad companies can be taken from them and transferred to a passenger for damages sustained by him solely by reason of his failure to exercise ordinary care—the care that is required of all persons at all times? Certainly not. The purpose and object of all constitutions is to protect individuals and their property from statutes of the character of the one in question, and to insure to all persons the equal protection of the laws.

Is a law equal in its operation which allows a person to profit by his own negligent or wrongful act, and punishes one therefor who has exercised the greatest care and prudence? Does it bear with an impartial hand when it compels A to respond to B for the wrongful or negligent

act of B, or for the failure of the latter to exercise ordinary care for his own safety? Do they stand equal before the law when the innocent is punished and made to respond in damages to the guilty?

If the lawmaking power can compel a railroad company to compensate a passenger for damages received by reason of his failure to exercise ordinary care, it can compel the payment of such damages if the damages were caused by the criminal negligence of the passenger. If the power exists in either of these cases, the Legislature can go farther and compel a carrier to respond to a passenger for damages caused to the latter by his own *intentional* act. There is no difference in principle in these cases, the difference being only in degree.

3. By this statute the railway company is made liable, even though it may have exercised and observed all possible care, caution and foresight in transporting and caring for the passenger and performed every duty and obligation imposed upon it by law. No such liability is imposed upon any other person, company, or corporation, although many other persons, companies and corporations engage in the transportation of passengers, in the operation of railroads, and in other business equally as dangerous; but railroad companies are singled out from all the others and made liable by this statute. The operation of a railroad is as lawful and as beneficial to the public as farming, manufacturing, or dealing in

wares, yet the farmer, the manufacturer and the dealer are protected in their pursuits and permitted to possess and retain their property as long as they exercise proper care and perform their duties according to law, but railroad companies are not. The right of property, under the Constitution of the United States, is just as valid and sacred to railroad companies as to other persons. Why should a railroad company be mulcted in damages when it has been guilty of no wrong and has maintained and operated its road and train with every possible care? Such burdens or liabilities are not and have never been imposed upon other persons, companies, or corporations. On other persons liabilities have never been imposed unless for the failure to perform some duty or obligation, or for some wrong done, and the person at fault is the one that is compelled to respond in damages in such cases; but the statute in question is at war with those cases, and railroad companies, burdened with the liability imposed thereby, do not stand equal with other persons before the law.

The statute does not, expressly or by implication, impose or attempt to impose a duty of any kind or character; it does not prescribe any regulation or precaution as to the operation of railroads or the running of trains, nor does it require that any care or caution or vigilance be used by railroad companies in the transportation of passengers or in the operation of its railroad or trains. It

imposes a liability without the breach of any duty or the violation of any right; and therein lie some of the objections which we urge against its validity.

The Supreme Court of Oregon, in the case of *Sullivan v. Oregon Railway and Navigation Co.*,[1] discusses this question very fully in connection with the statutes of the different States by which liabilities are imposed upon railroad companies, and it shows clearly that when a liability is thus imposed without the violation of a duty the statute has always been declared void and unconstitutional. The court said:

"As the defendant has the lawful right in a lawful way to run its trains, . . . there must be some violation of a duty imposed by law, or some act of negligence on its part. And it would follow, unless the act imposes some duty, the violation of which renders the defendant liable, it would be open to the objection that it subjects the defendant and its business to a liability where no wrong has been committed, or duty unperformed, thereby depriving it of its property and the equal protection of the law afforded to others."

Chief Justice BEASLEY, in speaking for the Supreme Court of New Jersey on this question, said:

"'No man is, in law, an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others. . . . The common rule, quite institutional in its character, is that, in order to sustain an action for a tort, the damages complained of must have come from a wrongful act. . . . Everywhere, in all the branches of the law, the general principle, that blame must be imputable as a ground of responsibility for damages proceeding from a lawful act,

[1] 19 Or. 319, 321.

is apparent.' A passenger is injured by the breaking of an axle of a public conveyanee; the carrier is not liable, unless negligence can be shown. A man's guest is hurt by the falling of a chandelier; a suit will not lie against the host, without proof that he knew, or ought to have known, of the existence of the danger. If the steam engine which did the mischief in the present case had been in use in driving a train of cars on a railroad, and had, in that situation, exploded, and had inflicted injuries on travelers or bystanders, it could not have been pretended that such damage was actionable, in the absence of the element of negligence or unskillfulness."[1]

Mr. ADDISON very correctly states the rule as follows:

"A man may, however, sustain grievous damages at the hands of another; and yet, if it be the result of a lawful act, done in a lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action for damages."[2]

The Supreme Court of Kansas says:

"Actions are founded only upon wrongs. A cause of action can exist only where some right has been violated. A cause of action founded upon negligence can exist only where the defendant owes some duty to the plaintiff, and wrongfully fails to perform that duty."[3]

The Supreme Court of Minnesota says:

"Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence."[4]

"It is the *fundamental* principle of law," says the Supreme Court of New York, "that the absolute right of every man to use his own property as he pleases for all purposes to which such property is usually applied, provided he exercises proper care and skill to prevent any

[1] Marshall v. Welwood, 38 N. J. L. 339-345.
Ulshowski v. Hill, 61 N. J. L. 375.
[2] Addison on Torts, Vol. 1, p. 3.
[3] A. & N. R. Co. v. Flinn, 24 Kan. 627, 639.
C. C. C. & St. L. R. Co. v. Ballentine, 84 Fed. Rep. 937.
[4] Akers v. Railway Co., 58 Minn. 544.

unnecessary injury to others, is *unlimited and unqualified* up to the point where the particular use becomes a nuisance."[1]

A case directly in point is that of *D. & R. G. R. R. Co. v. Outcalt*,[2] in which a recovery was sought under a statute of Colorado, which provided that railroad companies should be absolutely liable for all stock killed by their trains, without regard to the question of negligence or care on the part of the railroad companies. That statute was similar in principle to the one in question in the case at bar. The court, in holding it unconstitutional and void said:

"It [the statute] declares that the corporation shall be liable and make payment, for damages inflicted by inevitable accident, which no care, skill, diligence or foresight could prevent, and precludes the corporation from exculpating itself or making any defense whatever. In this it is discriminating, special and void. Natural persons are allowed to defend and exonerate themselves, show that the misfortune was inevitable, and the accident and damages unavoidable. Any statute that forecloses a defendant, and precludes all defense and denies the 'day in court' is and must be unconstitutional and void."

In the case of *O. & M. R. Co. v. Lackey*,[3] decided by the Supreme Court of Illinois, was involved a statute which provided that "every railroad company running cars within this State shall be liable for all the expense of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by

[1] Fisher v. Clark, 41 Barb. 329.
[2] 31 Pac. Rep. 177, 180.
[3] 78 Ill. 55, 56.

collision, or other accident occurring to such cars, or otherwise."

The court, in holding the statute unconstitutional, said:

"On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which, in other cases, are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred? An examination of the section will show that no default, or negligence of any kind, need be established against the railroad company, but they are mulcted in heavy damages if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful, and of great public benefit. It is not claimed that the liability attaches for a violation of any law, the omission of any duty or the want of proper care and skill in running their trains. . . . As argued by the counsel for appellant, the law attempts to place what is properly a public burden upon these corporations, which should be borne by all alike, and discharged out of public funds raised by equal and uniform taxation. . . . The views presented by appellant satisfy us the law in question cannot be sustained as a constitutional enactment."

In the nitro-glycerine cases[1] Mr. Justice FIELD in speaking for this court, said:

"No case or principle can be found, or if found, can be maintained, subjecting an individual to liability for an act done without fault on his part."

And in the case of *Harvey v. Dunlap*,[2] Mr. Chief Justice NELSON used the following language:

"All the cases concede that an injury arising from in-

[1] 15 Wall. 524, 539.

[2] Hill & Denio's Rep. 194.

evitable accident, or which in law and reason is the same thing, from an act which the ordinary care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility."

In the case of *Lozee v. Buchanan*,[1] Mr. Chief Justice SHAW said:

"We think as a result of all the authorities that the rule is that the plaintiff must come prepared with evidence to show that the *intention* was unlawful, or that the defendant was in *fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be held liable. If, in the prevention of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom."

The Supreme Court of Massachusetts, in the case of *Brown v. Kendall*,[2] used the following language:

"If in the prosecution of a lawful act a casualty purely accidental arises no action can be supported for any injury arising therefrom. . . . To make an accident or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency and in the circumstances in which he was placed."

The principle for which we contend is stated by this court in the case of *Gulf, C. & S. F. R. Co. v. Ellis.*[3] In that case was involved the constitutionality of a statute of Texas which provided that "railroad companies failing to pay claims less than fifty dollars for labor, damages, overcharges on freight or for stock killed, within

[1] 51 N. Y. 489.
[2] 6 Cush. 292, 296.
[3] 165 U. S. 150, 152.

thirty days after presentation thereof, shall be liable for attorney's fees not exceeding ten dollars." This court *held* the statute unconstitutional and void, and, in speaking through Mr. Justice BREWER, said:

"The single question in this case is the constitutionality of the act allowing attorney fees. The contention is that it operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made and only in certain cases. . . . The Supreme Court of the State considered the statute as a whole, and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors, and punishes them, when, for like delinquencies, it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts, as other litigants, under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fee of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong. They do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law."

The Supreme Court of Nebraska has said:

"The rights of every individual must stand or fall by the same *general* law that governs every member of the body politic in the land, under similar circumstances, and therefore a partial law which proposes to affect or destroy the rights of particular persons, or a *particular class* of persons, is not the law of the land."[1]

Defenses which are valid and absolute to other persons and corporations are, by this statute, taken from railroad companies, so that they cannot enter the courts with the same rights and privileges as other litigants. In cases against other persons or corporations the defense of contributory negligence, or that the damages complained of were caused entirely and solely by the negligence of the injured person, is good in every civilized country.

By this statute, as construed by the trial court and Supreme Court of the State, a railroad company is absolutely liable for all injuries received by its passengers while on its trains. It would be liable for injuries caused by lightning, or a missile hurled into a car by a person outside on a public highway.

The language of the Supreme Court of Tennessee is especially applicable at this time:

"Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another."[2]

[1] A. & N. R. Co. v. Baty, 6 Neb. 37.

[2] Vanzant v. Waddel, 2 Yerg. 260, 270.

It must be remembered that we are not discussing or considering the right of a State to control or regulate railroads or railroad companies. An altogether different question is presented; that is, the power of the State to take the property of one person and transfer it to another. This power is claimed to exist although the person from whom the property is taken has been guilty of no wrong, and has observed in every way his duty to the public as well as to the person to whom the property is given.

"Due process of law" does not mean a law which punishes one for doing that which the sovereign power has legally authorized to de done, or a law which imposes upon A a liability to B for a wrongful act or neglect of B.

In referring to this question, the Supreme Court of Nebraska has said:

"This common law right of property is secured by our constitution. It declares that 'no person shall be deprived of life, liberty or property without due process of law.' The terms 'due process of law' and 'the law of the land'—one or the other of which is found in all constitutions of the States—are said to mean the same thing; and it is quite clear that they are indifferently used in constitutions for the same purpose. They are said to refer to a pre-existing rule of conduct, and designed to exclude arbitrary power from every branch of the government. (*State v. Doherty*, 60 Me. 509. *Norman v. Heist*, 5 W. & S. 171. *The State v. Simon*, 2 Spears, 767.) Hence, these terms do not mean merely a legislative enactment; for 'if they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be taken,

imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; *and be deprived of his property*, his liberty and his life, without crime? Yet all this he may suffer if an act of the assembly, simply denouncing these penalties upon particular persons, or a particular class of persons, be in itself the law of the land within the sense of the constitution.' (*Hoke v. Henderson*, 2 Dev. 15.) Webster interprets these terms to mean 'that every citizen shall hold life, liberty, property and immunities under the protection of the *general rules* which govern society. Everything which may pass under the form of an enactment is not therefore to be considered as the law of the land'; and he says, if this were so, 'acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in every possible form would be the law of the land. There would be no general permanent law for the courts to administer, or even to live under. The administration of justice would be an empty form—an idle ceremony. Judges would sit to execute legislative judgments and decrees, and not to declare the law, or administer the justice of the country.'"[1]

The Legislature of Utah passed an act making railroad companies liable for the death of all live stock killed by its cars. In holding the statute unconstitutional and void as not due process of law, the Supreme Court said:

"But it yet remains for us to define 'due process of law,' as understood in the common law of England, and by inheritance the common law of America. Many definitions have been attempted, but it is believed that they all come to this citation, which means that a party shall have his day in court—trial, which means the right of each party, plaintiff and defendant, to introduce evidence to establish his right to recover on the one hand, and to establish his defense upon the part of the other, after

[1] A. & N. R. Co. v. Baty, 6 Neb. 37, 42.

which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them, is not 'due process of law.' Any other procedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial. Tested by the light of these suggestions, how stands it with the statute in this case? The defendant company, under a charter granted by the Legislature, of which the statute mentioned is no part, has purchased its right-of-way over the lands of the territory, established its track, and put thereon its engines and cars, for the purpose of carrying out the original design of the Legislature in granting its charter. It will then be seen that the defendant is in the exercise of a lawful right, in a lawful way. Now, comes the statute and says to the defendant: 'Notwithstanding all this, when you kill an animal you shall pay its value to the owner.' That is, although you are in the exercise of a perfectly lawful pursuit, and without any fault or negligence, proof of killing and value shall be conclusive evidence of wrong upon your part, and you shall not be allowed to aver or prove the contrary. If this be due process of law, then all the Legislature has to do, to take the property of A and give it to B, is to enact that when A sues B certain admitted facts shall establish conclusively A's right to recover, and B shall not be heard to introduce evidence to the contrary. No matter how careful and cautious an engineer may be in the management of his train; no matter how steep the grade may be that his train is going down; no matter how many hundred lives are in his care behind his engine—yet all must be sacrificed to save a horse or cow, or the company is to pay the damages. Hardly."[1]

Similar statutes were passed by the Legislatures of Colorado, Idaho, Montana and Washington,[2] but they have *all* been held by the Supreme Courts as not due process of law and void.

[1] Jensen v. R. Co, 6 Utah, 253.

[2] Cattrell v. R. Co., 2 Idaho, 540; Bielenberg v. R. Co., 8 Mont. 271; R. Co. v. Outcalt, 31 Pac. Rep. 177; Oregon Ry. & Nav. Co. v. Smally, 1 Wash. St. 206.

In *Zeigler v. R. Co.*,[1] a statute was under consideration which provided that railroad corporations should be liable for the value of all live stock killed by their trains, without reference to the skill or diligence with which the train was operated. The Supreme Court of Alabama said:

"This statute declares that railroad corporations shall be liable, and make compensation to the owner, for all damages to live stock caused by their locomotives or trains, without any reference to the skill or diligence with which the train is operated. It results that no matter what care, prudence, watchfulness and skilled knowledge those having charge of a train may employ, still, if damage to live stock be caused by the train, the railroad corporation is responsible, unless the person owning such live stock contribute to the injury; but permitting live stock to run at large shall not be considered as contributing to such injury. (Section 3 of the act.) It is obvious that under this statute the highest diligence could not avoid frequent injuries to live stock, for which the corporation would be held accountable, if the act be constitutional. Two facts, and two only, are required to be shown to authorize a recovery: Ownership of the property, and injury by the locomotive or cars of the railroad. The graver inquiry of capacity and diligence in the conduct of the train, the law assumes to determine or dispense with. Is this 'due process of law,' under section 7 of the declaration of rights? . . .

"The clause itself means that such legislative acts, as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it rested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually 'laws of the land,' for those purposes.

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[1] Zeigler v. R. Co., 58 Ala. 594, 596.

"'Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. . . . They were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' (Cooley Cons. Lim. 355.)

. . . . . .

"We have said above that the statute under discussion dispenses with all proof of the most material element of the wrong it seeks to redress. It declares that the railroad corporation shall make reparation for any injury inflicted in the authorized prosecution of its lawful business, without a semblance of fault, negligence, or want of skill in its employes; an injury, which no human prudence or foresight could prevent; and yet, the statute will not allow the railroad to exculpate itself, by proof of the highest qualifications and most watchful vigilance. This falls short of due process of law. We have heretofore declared a rule which exacts from railroad corporations a high degree of skill and diligence, to prevent injury to persons and property. (See *Tanner v. Louisville & Nashville R. R. Co.; Sav. & Memp. R. R. Co. v. Shearer*, and *S. & N. R. R. Co. v. Sullivan*, at the present term.) We have no wish to modify that rule. But when these very useful corporations conform to this strict rule of diligence, we can perceive no reason, in law or morals, for holding them to a stricter measure of accountability for inevitable misfortunes, than would be exacted from natural persons for injuries which result from unavoidable accident; or accidents which no human prudence can foresee or avert."

How could a proposition be clearer than the one just quoted? Under the statute in question railroad companies are not allowed a trial, or an examination of the facts or law on the question of liability. The liability is made absolute and conclusive as to all passengers who

are injured while being transported over the road, except those who are injured by their own *criminal* negligence, or by their violation of an express rule or regulation actually brought to their notice. All other questions relating to the liability or the right to recover are absolutely adjudged and finally determined against railroad companies. If the Legislature has the power to deprive a railroad company of the right to defeat such an action by showing that it was not negligent, or that the injury to the passenger was sustained by his own wrongful act, or by his failure to exercise ordinary care, the same power would enable it to say that the defendant could not defeat the action by showing that the injury was caused by the *criminal* negligence of the passenger, or by his violation of an express rule or regulation actually brought to his notice or by his intentional act. The extent to which the power is exercised does not determine the question of right or the validity of the act.

As was said by Mr. Justice BRADLEY, in *Boyd v. U. S.*:[1]

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it

[1] 116 U. S. 616, 635; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150.

consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

It must be remembered that the statutes of Idaho, Montana, Utah, Washington, Colorado and Illinois, all of which have been held unconstitutional, as stated above, were not as vicious as the statute of 1867, in question in this case. Neither of the first mentioned statutes deprive the defendant of the defense of contributory negligence, as the latter one does to a very great extent.

Especially applicable at this time is the following language of this court:[1]

"The law applicable to common carriers is one of great vigor. Though to the extent to which it has been carried, and in the cases to which it has been applied we admit its necessity and its policy, we do not think it ought to be carried further, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them."

It may be contended that the same reason exists for making railroad companies absolutely liable for damages to passengers as exists for holding them liable for the loss of goods or freight. This contention may seem plausible at first, but when considered in the light of the reasons for imposing the liability for inanimate objects, its unsoundness as applied to passengers is apparent.

[1] Boyce v. Anderson, 2 Pet. 154, 155.

The rule with reference to inanimate objects was first stated and the carrier held liable as an insurer of freight delivered to it for transportation, by Lord HOLT, in the case of *Coggs v. Bernard*, in 1703. In stating the rule, he said:

"As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts: either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier. . . . The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."[1]

The next case in which the reason for the rule was stated was that of *Riley et al. v. Horne*,[2] decided in 1828, by the Court of Common Pleas. In that case BEST, C. J., in speaking for the court, said:

"When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of

[1] 2 Ld. Raym. 917, 918.

[2] 5 Bing. 220.

their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes or loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves."

All subsequent cases in which this liability has been imposed have been based on these two cases, and no reason for imposing it, other than those quoted above, has ever been given. It is, therefore, clear that the reason for imposing this liability was, that as the goods or freight was delivered into the possession of the carrier and was no longer under the eye of the owner, and that the only person who could know of the manner in which the goods were damaged or destroyed would be the servants of the carrier, and they, "knowing that they could not be contradicted, would" perjure themselves and testify falsely in order to protect their master—the carrier. This court would not hesitate to declare unconstitutional a statute imposing or creating a liability having for its support the reasons stated in the cases just quoted from.

This liability has never been extended to passengers, and were it not so well fixed, it would, in this age of advanced civilization and enlightenment, be denied to goods and other inanimate objects. This is clear from the following language, used in 1869 by the same court that established the rule imposing the liability in 1703:

"The law of England has, from the earliest times, established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed, the responsibility of the carrier to redeliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed, and is so universally known, that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm or the common law declared long ago that carriers of goods should be so liable, it would not have been competent for the judges in the present day to have imported such a liability into their contracts on reasons of supposed convenience. But this is, as it seems to us, what we are asked by the plaintiffs to do in the case of carriers of passengers."[1]

But, as we have already stated, the relation of a carrier to a carload of freight and to a passenger is altogether different, and the transportation of the two is not and cannot be similar in any way, hence the liability must necessarily be different.

Passengers must be allowed some freedom — they cannot be stored away or taken possession of like freight or inanimate objects.

"Consequently," says Mr. Hutchinson, "the policy of the law, as it is called, which induced the judges in early times to establish the rule of the extraordinary responsibility of common carriers as to the goods entrusted to them, . . . was never applicable to carriers of passengers."[2]

In speaking for this court on this question Chief Justice MARSHALL said:[3]

[1] Readhead v. The Midland Railway Company, 4 L. R. Q. B. 380.

[2] Hutchinson on Carriers, sec. 497.

[3] Boyce v. Anderson, 2 Pet. 150, 154.

"There being no special contract between the parties in this case, the principal question arises on the opinion expressed by the court, 'that the doctrine of common carriers does not apply to the case of carrying intelligent beings, such as negroes.'

"That doctrine is, that the carrier is responsible for every loss which is not produced by inevitable accident. It has been pressed beyond the general principles which govern the law of bailment by considerations of policy. Can a sound distinction be taken between a human being in whose person another has an interest, and inanimate property?

"A slave has volition, and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently, this rigorous mode of proceeding cannot safely be adopted, unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not and cannot have the same absolute control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods.

"There are no slaves in England, but there are persons in whose service another has a temporary interest. We believe that the responsibility of a carrier for injury which such person may sustain has never been placed on the same principle with his responsibility for a bale of goods. He is undoubtedly answerable for any injury sustained in consequence of his negligence or want of skill; but we have never understood that he is responsible further."

But carriers have never been held liable for damages to freight that were caused by the act, whether negligent or otherwise, of the shipper. In order to place upon the

carrier the common law liability, the carrier must have the unlimited control of the property, which cannot be obtained in the transportation of passengers, as they are endowed with intelligence and must necessarily be allowed some freedom during transportation.

The reason why the liability in both cases is not the same is stated very clearly by Mr. Hutchinson, as follows:

"Public carriers may not only be carriers of goods, but carriers of persons also, and while carrying the goods, may at the same time carry their owners. As to the one, in such a case, the carrier would be a passenger carrier, and as to the other, a common carrier of goods; and although he might carry them both upon the same conveyance, and at the same time, the nature of the responsibility which he would incur as to them would be very different; and this difference in the kind of responsibility which the law imposes upon him exists even between the passenger and his baggage, as to which, as we have seen, the carrier becomes responsible as a common carrier of goods, although its carriage is merely incidental to the carriage of the passenger. Of the goods he must have, in order to impose upon him the responsibility of a common carrier, *the absolute and unlimited control*, and the law supposes that their safety, aside from the acts of God and the public enemy, against which it protects him, depends entirely upon the care and faithfulness with which he discharges his trust. But the passenger being endowed with intelligence and the power of locomotion, which enable him, in a great measure, to foresee and avoid danger, the exercise of at least ordinary prudence is required on his part to escape it, and if, by his failure to exercise these faculties for his own preservation, a misfortune befall him, though the carrier may have been in fault, it will be attributed to his own carelessness and inattention,

and the responsibility will not be thrown upon the carrier."[1]

The liability of an individual carrier as an insurer of dead freight is the same as that of corporate carriers. There is no good reason why the liability for injuries to passengers should be different in the case of an individual from that of a railway carrier.

In the case of *Hart v. C. & N. W. R. Co.*,[2] the defendant contended that it was not responsible for the loss of the freight if it was caused by the act of the owner, or by his failure to exercise ordinary care. The court, in upholding this contention, and in deciding that the carrier was not responsible for any damages caused by the act of the owner, used the following language:

"The question presented by this assignment of error, then, is, whether a common carrier is responsible for the injury or destruction of property while it is in the course of transportation, when the injury is caused by some act of the owner, but which is unattended with any negligence on the part of the owner.

"The carrier is held to be an insurer of the safety of the property while he has it in his possession as a carrier. His undertaking for the care and safety of the property arises by the implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of the rule is that, as the carrier ordinarily has the absolute possession and control of the property, while it is in course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. Therefore, if it is lost or destroyed while in his custody, the policy of the law imposes the loss upon him. (*Coggs v. Bernard*, 2 Ld.

[1] Hutchinson on Carriers, sec. 495, p. 398.

[2] 69 Iowa, 485, 487.

Raym. 909; *Forward v. Pittard*, 1 Durn. & E. 27; *Riley v. Horne*, 5 Bing. 217; *Thomas v. Railway Co.*, 10 Metc. 472; *Roberts v. Turner*, 12 Johns. 232; *Moses v. Railway Co.*, 24 N. H. 71; *Rixford v. Smith*, 52 id. 355.) His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God, or the public enemy; and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act; and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also. If the immediate cause of the loss was the act of the owner, as between the parties, absolute justice demands that the loss should fall upon him, rather than upon the one who has been guilty of no wrong; and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which plaintiff's servant, by his direction, took into the car, and which, at that time, was in the exclusive control and care of the servant, defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material. This view is abundantly sustained by the authorities. (See Hutch. Carr., § 216, and cases cited in the note; also Lawson Carr., §§ 19, 23.)"

It may also be contended that the act of 1867 should be upheld on the same ground that statutes making railway companies liable for damages caused by fire set out by their engines are held valid, but the reasons and grounds upon which the statutes are founded, are entirely different.

In pointing out this difference, the Supreme Court of Colorado said:

"The statute making every railroad company unconditionally liable in case it shall kill or damage a domestic animal by running its trains over or against such animal stands on a footing quite different from the fire statute. Fire is a dangerous element, and according to the ancient common law the rule was, as stated in the De Busk case, that 'a person who makes a fire must see that it does no harm, and must answer for the damage, if it does any.'"[1]

The Supreme Court of Missouri, in the Mathews[2] case, said:

"It ought not to excite surprise among a people, the great body of whose laws had their origin in England, that those who set out fires which destroy the property of others should be held absolutely responsible for them. Such was the ancient common law before any statutes were enacted. 'If my fire, by misfortune burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods and also my neighbor's house, he shall have his action on the case against me. So if the fire is caused by a servant, or a guest, or any person who entered the house with my consent; but otherwise if it is caused by a stranger who entered the house against my will.' Rolle's Abridgment, Action on the Case, 'B'; *tit.*, 'Fire.'"

"At common law," says the Supreme Court of the United States in the Mathews case, "every man appears to have been obliged, by the custom of the realm, to keep his fire safe so that it should not injure his neighbor; and to have been liable to an action if a fire, lighted in his own house, or upon his land, by the act of himself, or of his servants or guests, burned the house or property of his neighbor, unless its spreading to his neighbor's property was caused by a violent tempest, or

[1] Wadsworth v. U. P. Ry. Co., 18 Colo., 600, 610.

[2] 121 Mo., 298, 317.

other inevitable accident which he could not have foreseen."[1]

The Supreme Court of Arkansas, in referring to this same question, said:

"In Massachusetts, by statute, railroad companies are made absolutely liable for injuries by fire communicated from their engines; but in compensation are given an insurable interest in any buildings along the route. The courts have sustained this law, but the nature of it is peculiar and exceptional, and the language too clear to admit of doubt."[2]

Again: In the fire cases, the fire is set out and the damage is caused by the direct act of the company, in throwing, or permitting the fire to escape, from the locomotive; but in the case at bar the death of Zernecke was caused, not by any act of the plaintiff in error, but by the malicious and felonious act of a third party.

Suppose Davis, instead of derailing the train, had set fire on the right-of-way of the company without its consent or knowledge; and that such fire had escaped, without fault on the part of the company, to an adjoining field, causing damage to the owner thereof: could the company have been held for such damage? Clearly not. Or, to state a case more like the one at bar, suppose a man, for the purpose of committing murder or robbery, should set fire to a building of another, causing it to be consumed, and that the fire so started, without the fault of the owner of the building, should be commu-

[1] St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 5.

[2] Little Rock & Ft. Scott Ry. Co. v. Payne, 33 Ark. 816, 820.

nicated to and destroy another building: would any statute, which made the owner of the building first feloniously set on fire liable for damages to the other building, be valid?

We respectfully submit that the statute in question is unconstitutional and that the judgment of the Supreme Court of the State of Nebraska should be reversed.

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M. A. LOW,

Of Counsel.

No. 274. 58.

APR 16 19

In the Supreme Court of the United States.

Brf. of Harvey for D. E.

October Term, 1900.

No. 274.

Filed April 16 1901.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

BERTHA ZERNECKE, ADMINISTRATRIX OF THE ESTATE OF ERNEST H ZERNECKE, DECEASED,
Defendant in Error.

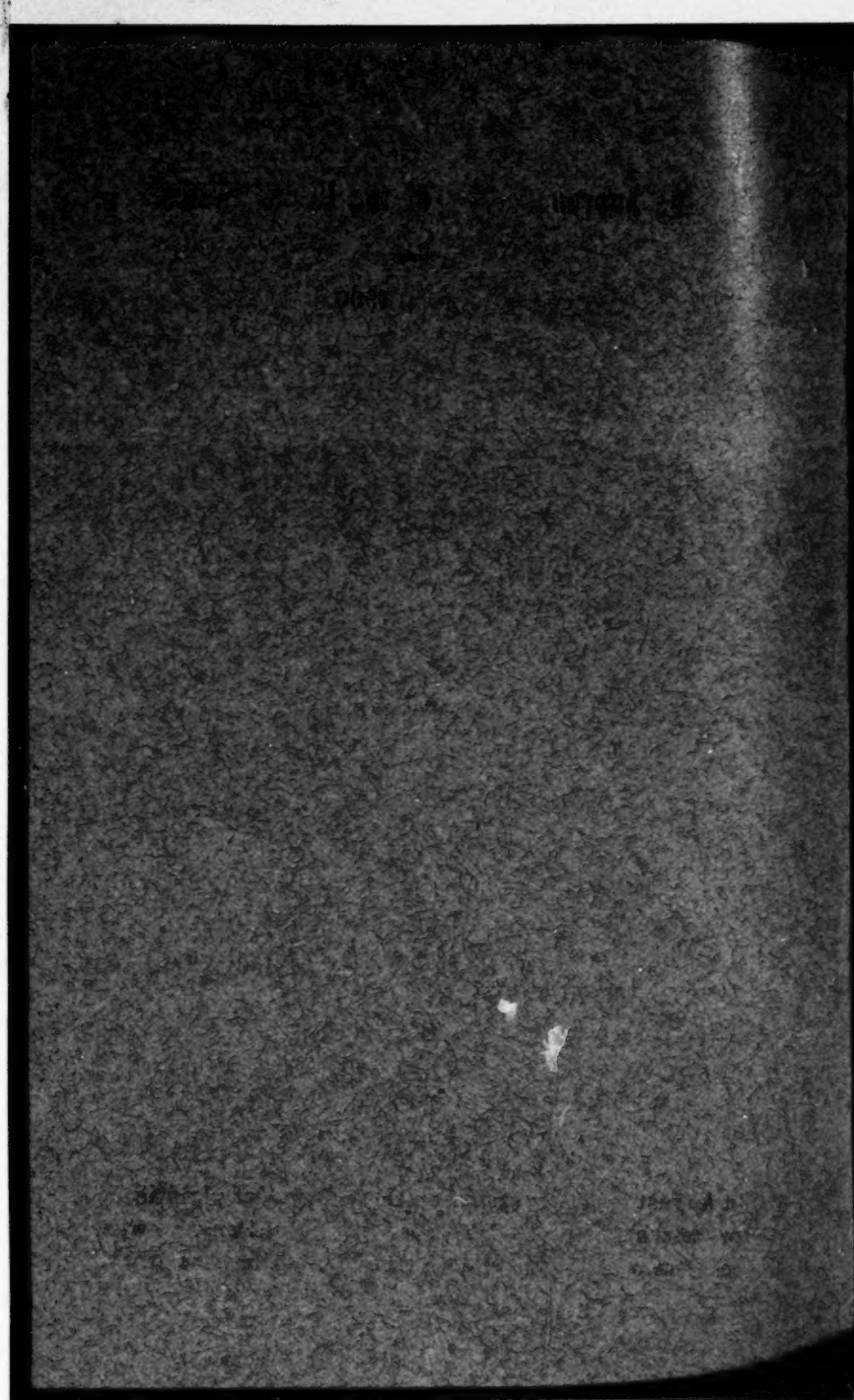
ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

Argument and Brief of Defendant in Error.

THOMAS C. MUNGER and
JOHN M. STEWART,
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STATEMENT.

On August 9, 1894, a train on the railroad of plaintiff in error in which Ernest Zernecke was a passenger, was wrecked near Lincoln, Nebraska, causing his instant death.

The defendant in error, as administratrix, brought this action in the district court of Thayer County, Nebraska, to recover from the railroad company damages resulting to the widow and children, by reason of such death. The wreck was caused by the train being derailed while running at a high rate of speed across a bridge about twenty feet high. Trial was had resulting in a judgment on November 19, 1896, in favor of defendant in error, for $4,500.00, from which judgment the company prosecuted proceedings in error to the supreme court of Nebraska. On March 7, 1900, the judgment of the district court was affirmed by such supreme court. The case now comes to this court from the supreme court of Nebraska on a writ of error to reverse its said judgment of affirmance.

Section 3, article 1, chap. 72 of the Compiled Statutes of Nebraska, provides as follows:

> "Every Railroad Company as aforesaid shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road, actually brought to his or her notice."

The supreme court of Nebraska has repeatedly construed its term "criminal negligence" in this statute to mean "gross negligence."

C. B. & Q. R. R. vs. Hague, 48 Nebr., 97.

C. B. & Q. R. R. vs. Landauer, 39 Nebr., 804.

U. P. R. R. vs. Porter, 38 Nebr., 226.

M. P. R. R. vs. Baier, 37 Nebr., 254.

F. E. & M. V. R. R. vs. French, 48 Nebr., 638.

C. B. & Q. R. R. vs. Wolfe, 85 N. W. Rep., ——

Section 110, chapter 16, of the same statutes provides:

"In case any passenger on any railroad shall be injured while on the platform of a car while in motion, or in any baggage, wood or freight car in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury, provided said company furnished room inside its passenger cars sufficient for the accommodation of its passengers."

The foregoing statutes were enacted in the year 1867, and long before the plaintiff in error was incorporated or owned or operated any railroad in the state.

Upon the trial in the district court the railroad company offered evidence tending to show that the derailment of the train in question was not caused by any negligence on its part, but by the act of a third party who purposely wrecked the train. This evidence on objection was excluded, the court holding that under the Nebraska statute the question as to whether the railroad company was negligent was immaterial. No evidence was given or offered tending to show that the deceased was guilty of any contributory negligence. The court instructed the jury in accordance with the provisions of the foregoing statute.

BRIEF AND ARGUMENT.

It is contended that the statute of Nebraska whereby railroad companies are made absolutely liable for all injuries sustained by passengers while being transported, except such as are occasioned by the negligence of the passenger, is unconstitutional in that it deprives such railroad company of its property without due process of law, and deprives it

of the equal protection of the laws. *This was the only constitutional question raised before the Nebraska supreme court. (Last assignment of error, page 6 of record.)*

The statute did not deprive the plaintiff in error of its property without due process of law.

The statute has been assailed by the railroad company as being unjust and unreasonable, and imposing on it a liability for injuries occuring without any fault on its part, thereby depriving it of its property without due process of law. It is true the statute extends the rule of absolute responsibility for the safe carriage of persons that heretofore obtained at common law, for the carriage of property, but such rule, we contend, is based on sound reason, is within the police power of the state, and is in accord with that principle of an advanced civilization which holds sacred human life and protection of the person.

The statute has been upheld in a large number of cases by the supreme court of Nebraska. See

Chollette vs. Railroad Company, 26 Nebr., 159.
Railroad Company vs. Chollette, 33 Nebr., 143.
Railway Company vs. Baier, 37 Nebr., 235.
Railway Company vs. Porter, 38 Nebr,, 226.
Railroad Company, vs. Hague, 48 Nebr., 97.
Railroad Company vs. Landauer, 39 Nebr., 803.
Railway Company vs. Chollette, 41 Nebr., 578.
Railroad Company vs. Hedge, 44 Nebr., 448.
Railroad Company vs. French, 48 Nebr., 638.
Railroad Company vs. Young, 58 Nebr., 678.
Railroad Company vs. Zernecke, 59 Nebr., 689.
Railroad Company vs. Wolfe, 85 N. W. Rep., decided March 21, 1901.

In the cases of Railway Co. vs. Porter, Railway Company vs. Baier, and in Railroad Co. vs. Chollette, 41 Nebr., 578, the constitutionality of the statute was directly drawn in question. In was contended in those cases that the statute violated the provisions of the State and United States constitutions in that it deprived the railroad company of its property without due process of law and denied them the equal protection of the law. In each of those cases the statute was upheld on both points as constitutional.

In the case of Chicago etc., R. R. Co., vs. Young, 58 Nebr., 678; 79 N. W. Rep. 556, the supreme court of Nebraska in passing upon the validity of the statute says:

> "The act of June 22, 1867, making railroad companies liable in the absence of negligence for injuries to passengers on their trains is justifiable legislation under the *police power* of the state. It aims to promote safety in travel, and neither deprives such companies of their property without due process of law, nor denies them the equal protection of the laws."

To show the necessity of such an enactment, we need but to refer to the common law rule and the reasons which caused its adoption

In Hutchinson on Carriers, Sec. 495, it is said:

> "Public carriers may not only be carriers of goods, but carriers of persons also, and while carrying the goods, may at the same time carry their owners. As to the one in such a case, the carrier would be a passenger carrier, and as to the other a common carrier of goods; and although he might carry them both on the same conveyance, and at the same time, the nature of the responsibility which he would incur as to them would be very different; and this difference in the kind of rseponsibility which the law imposes upon him exists even between the passenger and his baggage, as to which, as have seen, the carrier becomes responsible as a common

carrier of goods, although its carriage is merely incidental to the carriage of the passenger. Of the goods, he must have, in order to impose upon him the responsibility of a common corrier, the absolute and unlimited control, and the law supposes that their safety, aside from the acts of God and the public enemy, against which it protects him, depends entirely upon the care and faithfulness with which he discharges his trust. But the passenger being endowed with intelligence, and the power of locomotion, which enable him in a great measure to foresee and avoid danger, the exercise of at least ordinary prudence is required on his part to escape it, and if by failure to exercise these facilities for his own preservation, a misfortune befall him, though the carrier may have been in fault, it will be attributed to his own carelessness and inattention, and the responsibility will not be thrown upon the carrier."

The proposition that carriers ought not to be liable for injuries to passengers because the latter are presumed to be able to foresee and avoid danger, might have had some reason to support it in the days when travel was by the slow going stage coach; but to apply it to the case of passengers traveling at the rate of fifty or sixty miles per hour on a railroad in the present day, would be ridiculous in the extreme. What chance had the passengers in the ill-fated train in question to foresee and avoid danger? One moment they sat in supposed safety, and the next moment were crushed and dying. No opportunity was given them for the exercise of foresight and care. Under such conditions, what reason is there in a rule which says to the Rock Island Railroad Company: "You are liable for the baggage destroyed in this wreck but not for the injuries sustained by such passengers to their persons."

The supreme court of Nebraska in its latest decision upon this question, C. B. & Q. R. R. vs. Wolfe, 85 N. W. Rep., —— decided March 21, 1901, thus states the reasons why the

statute does not violate the fourteenth amendment to the constitution:

"It is sufficient to say that we are content with the soundness of the conclusions arrived at relative thereto and see no reason for abrogating or modifying them. The statute so strenuously attacked was progressive in its nature. The legislature in passing it took into consideration the fact that since the time the liability of of common carriers became fixed at common law through the decisions of court, the means of travel have become revolutionized. From comparatively safe and easily controlled means of travel, invention has progressed until the means have become a complicated and exceedingly dangerous machine propelled through space at an extremely rapid rate of speed and with the workings of which the public were unfamiliar and over which they had not the slightest control. Considering then the old law and the mischief that has arisen through the application of the inventive genius of the age to the means of locomotion, the legislature rightly conceived that the old law relative to the liabilities of common carrier in the respect indicated by this legislation has become obsolete, and it therefore proceeded to exercise the function for which it had been created, by curing that wherein the old law had become defective and inapplicable to modern conditions. Added to this, perhaps, was the consideration that there was no reason for making common carriers insurers of the safety of personal property confided to them that would not apply with equal force to the owners of that property where their persons were being transported from point to point, except, perhaps, those indicated by the exceptions contained in this law. It would seem that in law the owner should at least be equal to if not 'A little better than his dog, a little dear er than his horse.' This equality the law establishes, excepting from such liability the common carrier only in such instances as those wherein his judgment should guide him and prompt him to avoid a threatening danger."

In the case of Clarke vs. Russell. 38 C. C. A. Rep., 541, the question of the constitutionality of this statute was raised

and the statute upheld. The court of appeals in its opinion in this case says:

"A railroad company owes a duty to its passengers to carry them safely. A passenger is powerless to protect himself from injury resulting from derailment or wreck of the car, or from other causes. He is in the care and keeping of the railroad company, and has no knowledge of the railroad, rails, cars, locomotive, engines or other appliances or fixtures, or of the management and conduct of the train; or of the fitness of its employees and is frequently unable to locate the cause of the wreck and convict the company of negligence though the company may have been guilty of negligence. The company in such cases can easily produce evidence of due care which the passenger cannot be prepared to meet. It was considerations similar to these that led to the legislation making the railroad company absolutely liable for the damages resulting from fire escaping from its locomotive engines, and we may add that they are quite as forcible as any that are given for the adoption of the rule that made a common carrier insurer of the goods intrusted to him for carriage.

"It is settled by all the authorities that the carrier is an insurer of the passenger's baggage; and when the rule has not been changed by statute, we have this anomalous condition, that when a passenger and his baggage are injured in the same wreck the railroad is liable for damages done to the baggage irrespective of its negligence. The Nebraska statute does away with this and puts the passenger and his baggage on very much the same footing. And why not? There would seem to be more reason for protecting the passenger than his baggage. When a passenger without any fault on his part is injured, why should not the railroad company compensate him therefor? Grant that the company was innocent of any negligence or intent to injure him; the fact remains that it did injure him; and where one or two innocent persons must suffer a loss, why should not the one who inflicted the injury be required to bear the burden? It is quite clear that a common carrier of passengers who conducts its business by the powerful agency

of a railroad, the right to use which is derived from the legislation of the state, may be required by the state to compensate its passengers for injuries it inflicts upon them independent of any question of its own neglegence. Such a statute cannot be distinguished in principle from those we have referred to imposing an absolute liability for the loss of property by fire, or from the common law rule which imposes an absolute liability for the loss of the passenger's baggage. Both upon principle and authority the Nebraska statute is a valid enactment."

We have quoted thus fully from the opinion in the foregoing case for the reason that it sets out with clearness and force reasons which we contend sustain the statute in question. The fact that in the case of a wreck the company may be guilty of negligence and yet the passengers be utterly unable to prove such negligence, furnishes a most potent reason for the enactment of the statute. It was this consideration, among others, that led to the adoption at common law of the rule making a common carrier of goods absolutely liable for the safe carriage and delivery of property intrusted to him.

In the case at bar, probably a majority of the persons sons familiar with the circumstances surrounding the wreck, believe that the derailment of the train was due to the high speed at which it was running, coupled with some defect, and that the ignorant colored man who happened near the scene of the wreck had nothing to do with it, and has been made a scape-goat to relieve the company of responsibility. Conceding for the purpose of the argument that the wreck was actually caused as claimed by the company, by the criminal act of one Geo. W. Davis, due diligence in the matter of inspecting its track, might have prevented the derailment. A law that holds a railroad company absolutely liable for all injuries to passengers furnishes a powerful inducement to the exercise of the highest possible degree of diligence

and care on the part of such company to avoid such accidents. While injuries to passengers by derailment of trains or otherwise, on account of the high rate of speed, produced by the powerful agency of steam must always occur, yet a state enactment that directly tends to reduce injuries so caused to a minimum, is certainly a valid exercise of the police power of the state. Instead of holding the Nebraska statute invalid, we submit that this court should give it unqualified approval as being a wise and prudent rule designed for the safety of passengers, as well as for their remuneration for damages sustained in case of injury.

(b)

It will be observed that the statute in question gives the railroad company the right to make such rules as it may deem proper and necessary regulating the conduct and movements of the passengers while on its train, and if the passenger be injured while violating any such rule, the company is not liable. Any act which would amount to negligence by a passenger of his personal safety may be forbidden. The company may by rule require the *highest degree* of care by a passenger, and may by its rules forbid acts and movements that in the slightest degree tend to expose the passenger to injury. This provision of the statute alone renders baseless the criticism urged against which provides that "criminal negligence" only on the part of passengers will defeat recovery and that the passenger may be guilty of ordinary negligence and still recover damages.

The railroad company may make such rules as will bar recovery in the case even of slight negligence.

(c)

So far as plaintiff in error seeks to avail itself, in this case, of any claim that this statute deprived it of any defense of contributory negligence, either slight, gross or ordinary, it presents a hypothetical and not a real question. In the case at bar the plaintiff in error neither proved nor offered to prove any contributory negligence on the part of the deceased. The evidence and offers of proof by plaintiff in error were directed solely to the disproof of negligence on its part. The supreme court held in the Zernecke case (of which the Eaton case is a counterpart as to the plaintiff's in error evidence) that there was "an entire absence of evidence" to bring it within the statutory exceptions. See opinion of court in Zernecke record page 175 at top of page. In the offers of proof which embrace the most of the record in the case after page 41, the court will not find any evidence or offer of proof of any contributory negligence whatever. Therefore a reversal by this court for such a reason would give the plaintiff in error the benefit of a construction of the statute that it was not in position to claim, nor did claim in the trial or since. Moreover the latest construction put upon the statute by the supreme court of Nebraska in the case of C. B. & Q. vs. Wolfe, 85 N. W. Rep., ——, decided March 21, 1901, renders the statute invulnerable to this objection. The court holds a railway not liable to the passenger "*in such instances as those wherein his judgment should guide him and prompt him to avoid a threatening danger.*"

The circuit court of appeals of the 8th circuit in a late case, Clark et al., Rec'rs vs. Zarniko, 106 Fed. Rep., (decided Feb. 25, 1901) held that this statute does not make the railway company an insurer, but merely raises a presumption of negligence, and that contributory negligence is a

defense, at least when it is gross. Until a case is prosecuted to this court in which a railway company has been deprived of a defense that it has, and is ready to prove, it would seem that the objection that the statute may not allow such defense is premature.

(d)

But pursuing the argument, as if a case were actually before the court involving all these questions, yet we contend that the Nebraska statute, in thus raising the duties and liabilities of a railway passenger carrier above those imposed by the common law, to those of an insurer except as to the passenger's gross negligence, and except as to his violation of the rules by the railway prescribed, does not deprive the plaintiff in error of its property without due process of law.

1st. The statute was passed in 1867, long before plaintiff in error was incorporated or entered the state. But had it been passed after it had been in the state, the law applied only to the future, and the state can change the liabilities of corporations, and can regulate their relations to the public and their passengers and legislate for their lives and safety.

R. R. Co. vs. Mackey, 127 U. S. 205.

2nd. This law is essentially a police regulation. It is not a regulation of general property rights, nor is it a punishment for the non-payment of debts in general, as was the statute in the case of R. R. Co. vs. Ellis, 165 U. S. 150. It applies solely to cases involving the life and safety of passengers, as the Kansas statute passed upon in the case of A. T. & S. F. R. R. vs. Mathews, 174 U. S. 96, applied solely to cases of loss by fire. It is so construed by the Nebraska supreme court.

3d. It is urged that it changes the common law relations of carriers to passengers. In truth, the carriers have changed the relations between themselves and their passengers existing when the rules of the common law were fixed, by adopting the results of invention, so that travel has been revolutionized. They cannot complain if courts and legislatures take knowledge of these vast changes and legislate to meet the new conditions.

4th. The common law rules of liability and of evidence of liability are not such that they may not be changed when the security of the citizens requires it. This court has repeatedly held that laws having special effect on railways, and changing their relations and liabilities to the public from those under pre-existing laws violated no constitutional right. In R. R. Co. vs. Beckwith, 129 U. S., 26, this court upheld a statute of Iowa that was open to the same objections urged against this statute. Such statute made railroads liable for stock killed, independently of whether the railway was negligent or not, and the only exception was the wilful negligence of the person damaged, in this respect much broader than the Nebraska statute.

The Iowa statute imposed no duty to fence, except as implied from the liability imposed by the failure to do so, and required the payment of double damages, and took away contributory negligence as a defense unless it was wilful. In Nebraska a statute almost identical, found in the section preceding this passenger statute and a part of the same act has been many times upheld by the Nebraska supreme court. In R. R. Co. vs. Humes, 115 U. S. 512, this court sustained a Missouri statute making railroads liable absolutely for all stock killed where they had failed to fence, without regard to contributory negligence, the law providing that where fences were erected the railway was liable

only for negligence or wilful injury. The Nebraska statute and these statutes embody the same principles, the only difference being the occasion calling for their application, the one occasion being to enforce a new statutory or implied duty to fence, the other the old common law duty to safely carry the passenger. The duty owing the passenger is certainly as great as the statutory duty. In the recent case of R. R. vs. Mathews, 169 U. S., 65, the statute made the railway company absolutely liable as insurers against damages by fire communicated from their engines. This liability was not predicated on the violation of any statutory duty but on the principle of the general duty owing by railways to prevent destruction by fire. "To require the utmost care and diligence" says Justice Gray in this case, "of the railway corporations in taking precautions against the escape of fire from their engines, might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railway company, which employs the instruments and creates the peril for its own profit rather than upon the owner of the property who has no control over or interest in those instruments."

The validity of such a statute does not depend on the giving by it of an insurable interest to the railroad company, for this court in A. T. & S. F. R. R. vs Mathews, 174 U. S., 96, sustained a Kansas statute making the railway liable for damages caused by fire, when there was no provision in the statute giving such insurable interest.

But if the right to insure against such losses is to be considered a reason for upholding the statute, yet it was not

necessary for this statute to give the railroad an insurable interest against loss by such accidents, for the reason that the railway had the undoubted right to insure against its losses as a common carrier, whether they arose from negligence or accident. Such indemnity insurance is now one of the commonest forms of insurance.

Phoenix Ins. Co. vs. Transportation Co., 117 U. S. 312.

California Ins. Co. vs. Union Co., 133 U. S. 387.

Ins. Co. vs. Merrill, 155 Mass., 404.

Phillipsburg Co. vs. Ins. Co., 160 Pa., St. 350.

Ross vs. Ins. Co., 56 N. J. Eq. 41, (38 Atl. 22.)

Joyce on Ins. Secs. 2800-2803.

5th. This statute does not deprive plaintiff in error of its property without due process of law because it changes the the pre-existing common law rules. Very few statutes imposing duties or liabilities under the police power do not cause such a change. The statutes above noted requiring fences built along the track, had this effect. The same objection was made in this court to those statutes that abolished the common law defense as to the negligence of fellow servants in actions by employees for negligence.

This court has repeatedly held that it was within the power of the state to make the railway liable to a servant for a fellow servant's negligence, and the deprivation of such common law defense is not within the 14th amendment.

Tullis vs. R. R. Co., U S. , 20 S. C. R. 136.

M. P. R. R. vs. Mackey, 127 U. S., 205.

Minneapolis R. R. vs. Herrick, 127 U. S. 210.

For many years the decisions of the Illinois courts and of other states were upheld applying in place of the doctrine of contributory negligence the doctrine of comparative negligence. The Nebraska statute does not more offend against the constitution than this doctrine. The common law defense, arising from the slightest contributory negligence was not such property but that the courts of Illinois, Georgia and many other states could deprive defendants by judicial decisions in cases of negligence. It would seem to be within the power of the legislature to pass a law which does not thus offend more than judicial precedents.

Does not Deny Equal Protection of the Law.

The equal protection of the laws which is guaranteed by the fourteenth amendment of the constitution, does not forbid classification of subjects of legislation. Such has been the repeated holdings of this court.

In the case of A. T. & S. F. R. Co. vs. Mathews, 174 U. S. 101, a statute of Kansas allowing the plaintiff to recover an attorney's fee in case of recovery against a railroad company for damages occasioned by fire, Judge Brewer in delivering the opinion of the court says:

> "The equal protection of the laws which is guaranteed by the fourteenth amendment, does not forbid classification. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus when the legislature imposes on railroad corporations a double liability for stock killed by a passing train, it says in effect that if suit be brought against a railroad company for stock killed by one of its trains, it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only the damages it has done, but twice that amount. If it succeeds it recovers nothing. On the other hand, if

it should sue an individual for destruction of its live stock, it could under no circumstances recover any more than the value of the stock. So that it may be said in the matter of liability, in case of litigation, it is not placed on an equality with other corporations or individuals; yet this court has unanonimously said that this difference of liability, this inequality of right in the courts is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

In the case of New York etc., vs. Town of Bristol, 151 U. S. 556, Chief Justice Fuller says:

"The conclusion of this court has been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public and they are intrusted with the right of eminent domain only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression. That there is no unjust discrimination and no denial of the equal protection of the law in regluations applicable to all railroad corporations alike. And that the adjudications of the highest court of a state that in such particulars a law enacted in the exercise of the police power of the state, is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States."

In Charlotte etc. R. R. Co. vs. Gibbs, 142 U. S. 386, speaking of the power of the states to pass laws regulating railroad companies, Mr. Justice Field says:

"That regulations may extend to all measures deemed essential not only to secure the safety of passengers and freight, but to promote the convenience of the public in transacting business with them. In requiring this there is no encroachment upon the fourteenth amendment."

In Minneapolis etc. R. R. Co. vs. Emmons, 149 U. S. 364, the validity of a statute of the state of Minnesota making railroad companies liable for treble damages for stock killed on account of failure to fence its road was involved. It was held valid. In the opinion it is said:

> "The extent of the obligations and duties required of railway corporations or companies by their charter does not create any limitation upon the state against imposing all such further duties as may be deemed essential or importamt for the safety of the public, the security of passengers and employees or the protection of the property of adjoining owners."

The case of M. P. Ry. Co. vs. Mackey, 127 U. S. 205, is in point. In this case, speaking of the constitutionality of the statute of Kansas, making the railroad companies liable for damages sustained by its employees, caused by the negligence of fellow servants, says:

> "The hazardous character of the business of operating railroads, would seem to call for special legislation with respect to a railroad corporation, having for its object the protection of their employees, as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objection therefore can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity and all railroad corporations are without distinction made subject to the same liabilities, As said by the court below, it is simply a question of legislative discretion whether the same liability shall be applied to a carrier by canal and stage coaches.and to persons and corporations using steam in manufacturies."

The foregoing decision is distinctly approved and quoted with approval in the late case of Tullis vs. L. E. & W. R. R. Co., U. S. 20 Sup. Ct. Rep. 136, and in R. R. Co. vs. Mathews, 169 U. S. 25, and also in C. K. & W. R. R. vs. Pontius, 157 U. S. 209. Such legislation has been upheld in many states.

In the case of R. R. Co. vs. Paul, 37 L. R. A. Rep., 504, the supreme court of Arkansas, where a similar question is involved, says:

> "A statute imposing certain duties and liabilities on one class of corporations only, does not deny them the equal protection of the laws if the peculiar character of the business of the corporation is sufficient to justify this discrimination."

And this was affirmed in St. Louis R.R. Co. vs. Paul, 173 U. S. 404.

The supreme court of Missouri speaking of the statute making railroad companies liable for all fires set out by their locomotive engines, in the case of Mathews vs. R. R. Co., 121 Mo. 298, says:

> "If it could be shown that this statute imposes a burden on railroads from which it exempts others under the same or similar circumstances, then it would be open to the criticism that it deprives railroad companies of the equal protection of the law. But if the circumstances are different, if no other person, natural or artificial, is authorized to condemn or purchase a strip of land running through the lands of others, on its route and to run trains propelled by steam over its road at all times, day or night, and at all seasons, wet or dry, and using engines that scatter fire on the bordering property, though operated with a degree of care that amounts to faultlessness, all for its own profit, then we say that the statute is not obnoxious to the charge of denying railroads the protection it accords to others. So long as the statute imposes these duties on the only agents that have like powers to create similar hazards, it cannot be charged with inequality or unjust discrimination."

The claim of counsel that the statute deprives the plaintiff in error of the equal protection of the laws because it makes a railroad company liable in cases where it is not guilty of any fault or negligence, is entirely untenable.

In the recent case of R. R. Co. vs. Mathews, 169 U. S. 65, the Supreme Court of the United States held constitutional the statute of Missouri, rendering the railroad absolutely liable for all damages caused by fire set out by its engines. The basis of the liability is the dangerous character of the instrumentality used.

The reasoning in this case applies with equal force to the Nebraska statute in question. The court says:

> "To require the utmost care and diligence of a railroad corporation in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of railroads. When both parties are entirely faultless, the legislature may perhaps consider it to be just that the duty of insuring private property along its line from injury caused by the use of dangerous instruments, should rest on the railroad company, which employs the instruments, and creates the peril for his own profit, rather than on the owner of the property who has no control over or interest in these instruments."

In the same opinion the court further says:

> "The statute is not a penal one, imposing a punishment for the violation of a law, but is purely remedial, making a party doing a harmful act for its own profit, liable in damages to an innocent party injured thereby, and giving to that party the whole damages measured by the injury received. The statute is the constitutional and valid exercise of the legislative power of the state, and applies to all railroad corporations alike. Consequently it neither violates any contract between the state and the railroad company, nor deprives the company of its property without due process of law, nor yet denies it equal protection of the laws."

See also on this point the cases of Tullis vs. R. R. Co., U. S. 20 Sup. Ct. Rep. 136 and R. R. Co., vs. Mackey, 127 U. S. 205., in which it is held that the statutes of sev-

eral states by which railroad companies are held liable for damages sustained by their employees through the negligence of fellow servants, do not deny the equal protection of the law.

It is claimed by the railroad company that the provisions of the statute are harsh and oppressive. This claim we believe we have shown to be without foundation, but conceding such claim to be true, that would not render such statute unconstitutional.

In the case of Missouri Pac. Ry. Co. vs. Humes, 115 U. S. 512, this court holds that if a state law be within the legitimate sphere of legislative power and enforced according to general rules prescribed for security of private rights, their harshness, injustice and oppressiveness will not invalidate them as affecting life, liberty or property without due process of law.

Mr. Justice Field in his opinion says:

> "It is hardly necessary to say that the hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from state legislatures."

In the case of New York etc., R. R. Co. vs. Town of Bristol, 151 U. S. 556, it was held that a statute of Connecticut was constitutional which required railroad companies to pay the expense of abolishing grade crossings. The contention of the railroad company was that the provisions of the act was so unreasonable and unjust as to bring it within the constitutional inhibiton. On this question Chief Justice Fuller says:

> "But this court cannot proceed upon general ideas of the requirements of natural justice, apart from the provisons of the constitution supposed to be involved. As

observed by Mr. Justice Miller in Davidson vs. New Orleans, 96 U. S. 97 ,104, the 14th amendment cannot be availed of as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the state court of the justice of the decision against him, and of the merits of the legislation on which such decision may be founded."

We submit that the judgment of the Supreme Court of Nebraska should be affirmed.

THOMAS C. MUNGER and
JOHN M. STEWART,
Attorneys for Defendant in Error.
A. E. HARVEY, of Counsel.

Supreme Court of the United States.

No. 58.—October Term, 1901.

The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error, *vs.* Bertha Zernecke, Administratrix of the estate of Ernest H. Zernecke, deceased. } In error to the Supreme Court of the State of Nebraska.

[January 6, 1902.]

Mr. Justice McKenna delivered the opinion of the Court.

This action was brought in the district court of Lancaster County, Nebraska, by the defendant in error as the administratrix of the estate of Ernest H. Zernecke, deceased, against the plaintiff in error, for damages, under a statute of the State, for the death of Zernecke, caused by the derailment of the train of plaintiff in error upon which Zernecke was a passenger.

The plaintiff alleged negligence in the railroad company and its servants. The answer of the company denied negligence, and alleged that the derailment was caused by some person or persons unknown to the company, and not in its employment or under its control, who willfully, maliciously and feloniously removed and displaced from the track certain spikes, nuts, angle-bars, fishplates, bolts and rails, and otherwise tore up and destroyed the track. The company also alleged care in the maintenance of its track and the management of its train.

The petition alleged that the plaintiff in error "was a corporation, duly incorporated under the laws of the State of Nebraska," and the admission of the answer was that defendant in error, "at all times mentioned in said petition, was a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and a domestic corporation of the State of Nebraska."

The case was tried before a jury. The evidence of defendant in error (petitioner) was that at the time Zernecke was killed he was being transported as a passenger over the railway of plaintiff in error, and that the train upon which he was riding was thrown from the track, resulting in his death and the death of ten other persons. The plaintiff in error then offered witnesses and depositions to sustain the allegations of its answer. The testimony, upon the objection of defendant in error, was rejected, and at the close of the evidence, on motion of defendant in error, the court instructed the jury as follows:

"1. The jury are instructed that if you find from the evidence that Ernest H. Zernecke was a passenger, being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln,

Nebraska, on August 9, 1894, thereby causing the death of said Zernecke, and that plaintiff is administratrix, and she and her children had a pecuniary interest in his life and suffered loss by his death, then you should find for the plaintiff."

The jury returned a verdict for defendant in error for $4,500, upon which judgment was entered. The judgment was affirmed by the Supreme Court of the State, (59 Neb. 689,) and the case was then brought here.

The assignments of error are based upon the contention that the action of the district court and the decision of the Supreme Court in affirming the judgment of the district court were based upon section 3 of the act providing for the incorporation of railroad companies, and it is contended that the section contravenes the Fourteenth Amendment to the Constitution of the United States, in that said section deprives plaintiff in error of its property without due process of law. The section is as follows:

"Every railroad company, as aforsaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." (Compiled Laws of Nebraska, 838.)

The court, interpreting the statute, said:

"It gives or creates a right of action in favor of the injured passenger, and when it is established that a person is injured while a passenger of the railroad company a conclusive presumption of negligence arises in every case, except where it is disclosed that the injury was one caused by his own criminal negligence or by his violation of some rule of the company brought to his actual notice. . . . In other words, a conclusive presumption of negligence arises when the case does not fall within the exceptions of the law and he has his right of action. Now it is indisputable that if Zernecke had been injured merely, and not killed, he would have recovered against the railway company under said section 3, article 1, of chapter 72, and that thereunder said injuries would have been deemed to have been caused by the wrongful acts, neglect or default of the said railway company in failing to carry such passenger safely. Hence this case falls within the scope of said chapter 21 and the fact of negligence, or defendant's wrongful acts or default is established when the evidence discloses the facts specified in said section 3 of chapter 72."

In other cases the Supreme Court has passed upon the statute, the titles of which cases are inserted in the margin.*

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*Chollette *v.* Railroad Company, 26 Neb. 159; Railroad Company *v.* Chollette, 33 Neb. 143; Railway Company *v.* Baier, 37 Neb. 235; Railway Company *v.* Porter, 38 Neb. 226; Railroad Company *v.* Hague, 48 Neb. 97; Railroad Company *v.* Landauer, 39 Neb. 803; Railway Company *v.* Chollette, 41 Neb. 578; Railroad Company *v.* Hedge, 44 Neb. 448; Railroad Company *v.* French, 48 Neb. 638; Railroad Company *v.* Young, 58 Neb. 678; Railroad Company *v.* Wolfe, 86 N. W. Rep. 441, decided March 21, 1901.

In *McClary* v. *Sioux City & Pacific R. R. Co.*, 3 Neb. 44 (1873), railroad companies were held not to be insurers of their passengers. In that case the injury was caused by the upsetting of the train by a gust of wind. The negligence of the company consisted in being behind time. If the train had been on time it would have escaped the tempest. The negligence, it was decided, was too remote as a cause, and the company was held not liable.

Subsequently, (39 Neb. 803,) railroad companies were held to be insurers of their passengers. The company escaped liability, however, by reason of the gross negligence of the person injured.

In *Omaha & R. V. R. Co.* v. *Chollette*, (33 Neb. 143,) the words of the statute exempting railroad companies from liability, "where the injury done arose from the criminal negligence of the persons injured," were defined to mean "gross negligence," "such negligence as would amount to a flagrant and reckless disregard" by the passenger of his own safety, and "amount to a willful indifference to the injury liable to follow." This definition was approved in subsequent cases. It was also approved in the case at bar, and the plaintiff in error, it was in effect declared, was precluded from any defense but that of negligence as defined, or that the injury resulted from the violation of some rule of the company by the passenger brought to his actual notice, and the company, as we have said, was not permitted to introduce evidence that the derailment of its train was caused by the felonious act of a third person. The statute, thus interpreted and enforced, it is asserted, impairs the constitutional rights of plaintiff in error. The specific contention is that the company is deprived of its defense, and not only declared guilty of negligence and wrongdoing without a hearing, but adjudged to suffer without wrongdoing, indeed even for the crimes of others, which the company could not have foreseen or have prevented.

Thus described, the statute seems objectionable. Regarded as extending the rule of liability for injury to persons which the common law makes for the loss of or injury to things, the statute seems defensible. And it was upon this ground that the Supreme Court of the State defended and vindicated the statute. The court said:

"The legislation is justifiable under the police power of the State, so it has been held. It was enacted to make railroad companies insurers of the safe transportation of their passengers, as they were of baggage and freight; and no good reason is suggested why a railroad company should be released from liability for injuries received by a passenger while being transported over its line, while the corporation must respond for any damages to his baggage or freight."

Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty law is another. Other examples are afforded in the

liability of the husband for the torts of the wife—the liability of a master for the acts of his servants.

In *Missouri Railway Co.* v. *Mackey,* (127 U. S. 205,) a statute of Kansas abrogating the common law rule exempting a master from liability to a servant for the negligence of a fellow-servant, was sustained against the contention that such statute violated the Fourteenth Amendment of the Constitution of the United States. And in *Minneapolis &c. Railway Co.* v. *Herrick,* (127 U. S. 210,) a statute of Iowa which extended liability for the "*wilful wrongs, whether of commission or omission,*" of the "agents, engineers or other employees" of railroad companies, was vindicated against the double attack of being an unjust discrimination against railroad corporations and the deprivation of property without due process of law. See also *Tullis* v. *Lake Erie & Western Railroad,* (175 U. S. 348.)

It seemed to the able judges who decided *Coggs* v. *Bernard,* that on account of the conditions which then surrounded common carriers public policy required responsibility on their part for all injuries to and losses of goods entrusted to them, except such injuries and losses which occurred from the acts of God or public enemies, and many years afterwards Chancellor Kent praised the decision of cases which declined to relax the rule to excuse carriers for losses by fire. That rule was not and has not been extended by the courts to passengers, and Chief Justice Marshall, in speaking for this court in *Boyce* v. *Anderson,* (2 Pet. 150,) refused to apply the rule to slaves, saying: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases in which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further, or applied to new cases. We think is has not been applied to living men, and that it ought not to be applied to them."

But because courts have not extended the doctrine to carriers of passengers, it does not follow that a State legislature is precluded from doing so. The common law doctrine was declared by Chief Justice Holt in *Coggs* v. *Bernard* to be "a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."

That reason may not apply to passengers but other reasons do, which arise from the conditions which exist in and surround modern railroad transportation, and which may be considered as strongly justifying a rule of responsibility for injury to passengers which makes sure, as the common

rule law does, that responsibility be not avoided by excuses which do not exist, or the disproof of which might be impossible.

We might extend the discussion and illustrate it by other cases, but however interesting such discussion might be we do not think it is necessarily demanded by this record. We think plaintiff in error is precluded from objecting to the rule of liability expressed in section 3. That rule of liability was accepted by plaintiff in error as a part and as a condition of its charter. "It was incorporated under the laws of the State of Nebraska," is the allegation of the petitioner. "It is . . . a domestic corporation of the State of Nebraska," is the allegation of the answer. It was incorporated, therefore, under the railroad incorporation act of 1867, and the liability which has been enforced upon it by the decision of the Supreme Court of the State is the liability declared by section 3 of that act. That liability, we repeat, plaintiff in error accepted with its incorporation, and cannot now complain of it. (*Waters Pierce Oil Co.* v. *Texas*, 177 U. S. 28.) We need not repeat the reasoning of *Waters Pierce Oil Co.* v. *Texas*. The case followed and applied the doctrine of many prior cases.

Judgment affirmed.

Mr. Justice GRAY did not hear the argument and took no part in the decision.

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Clerk Supreme Court, U. S.

END OF CASE